

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

**Complaint no.** : 1282 of 2019  
**First date of hearing:** 29.08.2019  
**Date of decision** : 29.08.2019

Ms. Kanchan Riat  
(Through Mr. Narender Pal Riat,  
Special Power of Attorney Holder)  
Address: N2/4, DLF Colony, Phase 2,  
Gurugram, Haryana.

**Complainant**

Versus

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

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Joginder Lal Khatri  
Shri Jasdeep

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. A complaint dated 15.04.2019 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 Ms. Kanchan Riat (through Mr. Narender Pal Riat, special power of

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attorney holder), against the promoter M/s Sepset Properties Pvt. Ltd., on account of violation of the clause 3.1 of the apartment buyers agreement executed on 05.06.2013 in respect of unit described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act ibid.

2. Since, the apartment buyers agreement has been executed on 05.06.2013 i.e. prior to the commencement of the Act ibid, 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 statutory 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	"Paras Dews", Sector-106, Gurugram.
2.	Nature of the project	Group housing colony
3.	Project area	13.762 acres
4.	DTCP license no.	61 of 2012 dated 13.06.2012
5.	<b>Building plans</b> approved on	29.12.2012

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		(page 34 of complaint)
6.	<b>Environmental clearance</b>	06.09.2013 (page 23 of reply)
7.	Registered/ not registered	<b>Registered</b>
8.	HRERA registration no.	<b>118 of 2017 dated 28.08.2017</b>
9.	HRERA registration certificate valid up to	<b>31.07.2021</b>
10.	<b>Occupation certificate received on</b>	<b>15.01.2019</b> (page 18 of reply)
11.	Allotment letter	10.01.2013
12.	Unit no.	03, 8 <sup>th</sup> floor, tower B
13.	Unit measuring	1760 sq. ft.
14.	Date of execution of apartment buyers agreement	05.06.2013
15.	Payment plan	Construction linked plan [Page 65 of complaint]
16.	Total cost of the unit as per statement of account dated 07.05.2019	Rs.1,16,77,352/- (including taxes) [Page 38 of reply]
17.	Total amount paid by the complainant as per statement of account dated 07.05.2019	Rs. 1,04,92,279/- [Page 38 of reply]
18.	Due date of delivery of possession as per clause 3.1 of apartment buyers agreement i.e. within a period of 42 months with an additional grace period of 6 months from the date of execution of this agreement <b>(05.06.2013)</b> or date of obtaining all licenses or approval for commencement of construction <b>(EC granted on 06.09.2013)</b> , whichever is later.	<b>06.09.2017</b>
19.	<b>Offer of possession</b>	<b>24.01.2019</b>

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		[Page 37 of reply]
20.	Delay in handing over possession till date of offer of possession i.e. 24.01.2019	1 year 4 months 18 days
21.	Penalty clause as per clause 3.3 of apartment buyers agreement dated 05.06.2013	The company shall pay compensation calculated @ 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 has paid the entire amount to the seller strictly on time or as demanded by the seller.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. An apartment buyers agreement dated 05.06.2013 is available on record for the aforesaid unit according to which the possession of the said unit was to be delivered by 06.09.2017 and the possession was offered by the respondent on 24.01.2019. The respondent has not paid any interest for the period it delayed in offer of possession. Therefore, the promoter has not fulfilled its committed liability as on date.

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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 29.08.2019. The respondent through its counsel appeared on 29.08.2019. The reply filed on behalf of the respondent on 10.05.2019 has been perused by the authority.

**Facts of the complaint**

6. The complainant submitted that Mr. Rakesh Mathur applied for booking of a 3BHK apartment measuring 1760 sq. ft. in the project "Paras Dew's" in Sector 106, Dwarka Express, Gurugram, being developed by M/s Sepset Properties Pvt. Ltd. The complainant purchased the above apartment from Mr. Rakesh Mathur as per sale agreement dated 15.03.2013 and the flat was transferred in the complainant's name on 24.05.2013 in the books of the builder.
7. The complainant submitted that as per clause 3.1 of the said agreement dated 05.06.2013, the possession of the said unit was to be handed over by 04.06.2017. The total cost of the apartment is Rs.1,08,31,200/-. Till date the complainant has paid Rs.1,04,92,279/- which is about 97% of the total cost.

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8. The complainant submitted that vide letter dated 24.01.2019, the respondent informed that they have received occupation certificate and offered possession to the complainant enclosing a statement of account asking to pay balancing amount of Rs.11,85,073/- towards the cost of the apartment. In addition, the respondent has also demanded two-year advance maintenance charges calculated at the rate of Rs.3.10 per sq. ft. plus GST amounting to Rs.1,54,514/-. The respondent also demanded club usage charges in advance for 2 years amounting to Rs.36,816/-. However, the respondent has not given any delayed possession interest though the possession has been delayed by more than 22 months.
9. The complainant submitted that the holding charges as per clause 3.4 of the agreement is an exorbitant Rs.30/- per sq. ft. per month whereas the delayed possession charges are only Rs.5/- per sq. ft. per month. This clearly shows that the agreement is totally unfair and one-sided.

**Issues to be decided**

10. The complainant has raised the following issues:

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- i. Whether the respondent is in default in delaying the possession by more than 22 months?
- ii. Whether the respondent is liable to make delayed possession charges @18% per annum as he has charged the delay payment charges at the same rate?
- iii. Whether the respondent is within its right to demand maintenance charges in advance and that too for period of 2 years?
- iv. Whether the respondent is within his rights to demand holding charges at an exorbitant rate of Rs.30/- per month especially keeping in view the fact that the delayed possession charges, as per the agreement, is a meagre sum of Rs.5/- per sq. ft. per month?

**Reliefs sought**

11. The complainant is seeking the following reliefs:
  - i. In view of inordinate delay of more than 28 months in giving possession as per the said agreement, the entire interest @ 18% per annum on the amount paid from the promised date of possession (i.e. 04.12.2016) till date be paid to the complainant immediately.

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- ii. Thereafter, delayed possession interest is given pro rata on a monthly basis before the 10<sup>th</sup> of every month till the possession is handed over.
- iii. The respondent be directed not to charge maintenance charges in advance for more than a quarter.
- iv. The respondent be directed not to demand club usage charges in advance for more than a quarter.
- v. Since the delay in giving possession is due to their own fault, no holding charges be charged from the complainant.
- vi. Any other order that this court deems fit and proper may kindly be granted to the applicant.

**Respondent's reply**

12. The respondent submitted that the complainant herein is not a genuine apartment purchaser or consumer and had purchased the said apartment for commercial and investment purposes for which the jurisdiction of this authority cannot be invoked, since the object of the said Act is to protect the interests of the consumers and not the investors. Since, the complainant has not been successful in selling the apartment

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at a premium, he has filed this frivolous complaint just to avoid making the remaining payments in terms of the agreed payment plan.

13. The respondent submitted that the complainant herein has herself been 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 said Act and in view of the same, the complaint may be dismissed.
14. The respondent 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.
15. The respondent submitted that the present complaint is not maintainable since the possession had to be handed over to the complainant in terms of clause 3.1 and 3.2 of the apartment buyers agreement which clearly provide that subject to the complainant complying with all the terms of the agreement and making timely payments of the instalments as and when they fall due, the respondent proposes to offer the possession

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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 license and approvals for commencement of the construction, whichever is later subject to force majeure. Moreover, all the approvals for commencement of construction work were received towards the end of 2013 and construction work commenced in January 2014. The completion and offer of possession were subject to the complainant having complied with all the terms and conditions of the said agreement, which has not been done in the present case since the complainant admittedly has not paid the full consideration and the outstanding dues. Thus, 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.

16. The respondent submitted that the construction of the subject 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 possession to the complainant subject to payment of the outstanding dues as per the said agreement.

17. The respondent submitted that section 19 of the said Act lays down the rights and duties of the allottees and section 19(6) 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 complainant that he has failed to make complete payment therefore, the complainant is in breach of the said Act and Rules made thereunder. It is the respondent herein who has suffered due to the breaches committed by the complainant since the respondent has continued with the construction of the apartment despite the complainant not paying the complete consideration.

18. The respondent submitted that the hon'ble Supreme Court in the case of *Saradmani Kandappan and ors. V. S. Rajalakshmi and ors.* decided on 04.07.2011,



(2011) 12 SCC 18, in para 33 and 34, while interpreting similar contracts and involving performance of reciprocal promises in respect to immovable properties has interpreted section 52, 53 and 54 of the Indian Contract Act, 1872 to hold that in case of a contract wherein payments are to be paid by the purchaser in a time bound manner as per the agreed payment plan and he fails to do so then the seller shall not be obliged to perform its reciprocal obligations and the contract shall be voidable at the option of the seller alone and not the purchaser. The said dictum is applicable in the present case as well since not only does the order of performance of reciprocal performances as per the agreement mandate timely payments by the complainant but also since the complainant admitted in the complaint of not having paid the due and payable instalments. Therefore, the respondent was not obliged to complete construction and offer possession till the time the complainant performs her obligation under the agreement. Moreover, the complainant also cannot seek interest or damages since she is in default and it is the respondent who has completed the construction and can exercise its right to

cancel the agreement or claim damages from the complainant for the defaults on his part.

19. The respondent submitted that the hon'ble National Consumer Disputes Redressal Commission in the case of **Manas Developers V. 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 judgement is squarely applicable to the facts of the present case and the present complaint be out rightly dismissed with cost in view of the same.

20. The respondent submitted that the hon'ble Supreme Court in the case of **Supertech V. Rajni Goyal, decided on 23.10.2018, 2018 (14) SCALE187**, has held that consumers cannot be allowed to reap the benefits of their own wrong by not taking

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possession when the same has been offered by the builder and the computation of interest also closes on the said date.

21. The respondent submitted that the complainant had herself approached the respondent after verifying the project in question and had made an application for booking of the flat after her complete satisfaction of the project and its possible appreciation in the market.

#### **Determination of issues**

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

22. With respect to the **first and second issue** raised by the complainant, as per clause 3.1 of the apartment buyers agreement, the possession of the unit was to be handed over within a period of 42 months 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. The agreement was executed on 05.06.2013 and the environmental clearance was



granted by the concerned authority on 06.09.2013. The relevant clause regarding the possession of the said unit is reproduced below:

*"3 Possession of the said apartment*

*3.1 ...the seller proposes to hand over the possession of the apartment to the purchaser (s) within a period of 42 months 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."*

23. Accordingly, the due date of handing over possession comes out to be 06.09.2017. However, the possession was offered by the respondent on 24.01.2019 and the possession has been delayed by 01 year 04 months and 18 days till the date of offer of possession. Thus, respondent has failed in handing over the possession of the subject unit as per the terms and conditions of the apartment buyers agreement and its obligation as envisaged under section 11(4)(a) of the Act *ibid*. As the promoter has failed to fulfil its obligation as per section 11 of the Act *ibid*, the promoter is liable under section 18(1) proviso read with rule 15 of the Rules *ibid*, to pay interest to the complainant, at the prescribed rate, for every month of delay

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till the offer of possession and not 18% as claimed by the complainant.

24. With respect to the **third 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".

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On perusal of record it is found that there is no such maintenance agreement that 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.

25. With respect to **fourth issue** raised by the complainant, the respondent is charging holding charges at exorbitant rate of Rs.30/- per sq. ft. per month in terms of clause 3.4 of the said agreement from the complainant. However, the delay compensation payable by the respondents is @ Rs.5/- per sq. ft. per month for the period of delay as per clause 3.3 of the said agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent 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:

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*"...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."*

### **Findings of the authority**

26. 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & 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.
27. As per clause 3.1 of the apartment buyers agreement dated 05.06.2013 for the subject apartment, possession was to be

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handed over to the complainant within a period of 42 months from the date of execution of this agreement i.e. 05.06.2013 or date of obtaining licenses or approval for commencement of construction i.e. 06.09.2013, whichever is later + 6 months grace period which comes out to be 06.09.2017. The respondent has received occupation certificate on 15.01.2019 and offered the possession of the unit to the complainant on 24.01.2019. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum with effect from due date of delivery of possession (06.09.2017) till date of offer of possession i.e. 24.01.2019 as per the proviso to section 18(1) of the Real Estate (Regulation and Development) Act, 2016.

### **Decision and directions of the authority**

28. 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 issues the following directions to the parties in the interest of justice and fair play:

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
- (i) The complainant is directed to take over the possession of the offered 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 liable to pay delayed possession charges at prescribed rate of interest i.e. 10.45% per annum with effect from the due date of possession i.e. 06.09.2017 till offer of possession i.e. 24.01.2019.
- (iii) The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order.
- (iv) The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- (v) The promoter shall not charge anything from the complainant which is not part of the said agreement.
- (vi) The interest on the due payments from the complainant shall be charged at the prescribed rate of 10.45% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

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(vii) The 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 charged till its completion.

29. Complaint is disposed of.
30. The order is pronounced.
31. Case file be consigned to the registry.

  
(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.08.2019

Judgement uploaded on 05.09.2019

  
(Subhash Chander Kush)

Member

S.C. KUSH

MEMBER

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LEGAL ASSISTANT

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GURBACHAN KAUR  
LEGAL OFFICER