

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

Complaint no. : 2212 of 2018
First date of hearing: 30.05.2019
Date of decision : 05.09.2019

Mrs. Sandhya Goel
R/o House no. 125, Urban Estate,
Jind, Haryana.

Complainant

Versus

M/s Today Homes & Infrastructure Pvt.
Ltd.,
Regd. Office: Statesman House, 8th floor
Barakhamba Road, New Delhi - 110001

Also at: Callidora Marketing Site, Sector-73,
Behind DPG College, Subhash Chowk to
Hero Honda Road, Gurugram - 122001.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Amit Singh

Advocate for the complainant
Advocate for respondent

ORDER

1. A complaint dated 13.12.2018 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, 2016 by the complainant Mrs. Sandhya Goel, against the promoter M/s Today Homes & Infrastructure Pvt. Ltd. and Others, on account of violation of the clause 21 of the agreement to sell executed on 15.06.2011 in respect of unit described below in the project 'Canary Greens' located at Sector 73, Gurugram 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 agreement to sell was executed on 15.06.2011 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat this complaint as an application for non-compliance of statutory obligations on the part of promoter under section 34(f) of the Act *ibid.*

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

1.	Name and location of the project	'Canary Greens' Sector-73, Sohna Road, Gurugram, Haryana.
2.	RERA registered / not registered	Not registered

3.	Nature of real estate project	Group housing colony
4.	Total area of the project	21.55 acres
5.	Allotted unit no.	0302, 3 rd floor, tower T7
6.	Unit measuring area	1640 sq. ft.
7.	Date of execution of agreement to sell	15.06.2011
8.	Total consideration as per statement of account dated 19.11.2018	Rs.71,79,800/- (page no. 35 of the complaint)
9.	Total amount paid by the complainant as per statement of account dated 19.11.2018	Rs. 69,50,587.78/- (page no.36 of complaint)
10.	Payment plan	Construction linked plan (Page no. 28 of complaint)
11.	Due date of delivery of possession as per clause 21 of the agreement dated 15.06.2011 i.e. possession to be delivered within 36 months from the date of execution of agreement plus 6 months grace period.	15.12.2014
12.	Delay in handing over possession till date of decision i.e. 05.09.2019	4 years 8 months 21 days
13.	Penalty clause as per clause 21 para 2 agreement to sell dated 15.06.2011	Rs.5/- per sq. ft. per month for the period of delay after expiry of grace period of 6 months from the stipulated date for delivery of possession.

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 agreement to sell dated 15.06.2011 is available on record for the aforesaid unit.

As per clause 21 of the agreement to sell dated 15.06.2011, possession of the said unit was to be delivered by 15.12.2014. The respondent has neither delivered the possession of unit nor have paid the compensation at the rate of Rs. 5/- per sq. ft. per month for every month of delay, as per terms of the said agreement. Therefore, the promoter has not fulfilled their committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The case came up for hearing on 30.05.2019, 24.07.2019 and 05.09.2019. The reply filed on behalf of the respondent on 24.07.2019 has been perused by the authority. The respondent through his counsel appeared on 30.05.2019.

Brief facts of the complaint

6. Briefly stated, the facts of the complaint are that the respondent gave advertisement in various leading newspapers about their forthcoming project named "Canary Green", Sector-73, Sohna Road, Gurugram promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the

promises and undertakings given by the respondent in the advertisements, Mr. Kamal Kishore Bhartia, booked a flat measuring 1640 sq. ft. in aforesaid project of the respondent for total sale consideration of Rs.71,79,800/-. The complainant made total payment of Rs.69,50,587.78/- to the respondent vide different cheques on different dates.

7. The complainant submitted that as per the agreement to sell dated 15.06.2011, the respondent had allotted a unit/flat no. 0302, tower-T7 having super area of 1,640 sq. ft. to the complainant. As per clause 21 of the agreement to sell, the respondent had agreed to deliver the possession of the flat within 36 months from the date of signing of the agreement to sell dated 15.06.2011 with an extended period of six months.
8. The complainant submitted that she 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. Despite receiving 95% approximately payments on time and 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.

9. The complainant alleged that the construction of the block in which the flat was booked was not completed within time for the reasons best known to the respondent which clearly shows that the ulterior motive of the respondent was to extract money from the innocent people fraudulently.
10. The complainant submitted that due to this omission on the part of the respondent, she has been suffering from disruption on her living arrangement, mental torture, agony and also continues to incur severe financial losses. As per clause 21 para 2 of the said 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 flat for the period of delay. It is however, pertinent to mention here that such 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 have exploited them by not providing the possession of the

flat even after a delay from the agreed possession plan. It could be seen here that the respondent has incorporated the clause in one sided agreement to sell 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 respondent charged 18% per annum interest on delayed payment.

11. The complainant submitted that on the ground of parity and equity, the respondent should also be subject to pay the same rate of interest hence the respondent is liable to pay interest on the amount paid by the complainant from the promised date of possession till the flat is actually delivered to her. Hence, the complainant has filed the present complaint before this authority.

Issues to be decided

12. The complainant has raised the following issues:
- i. Whether the developer has violated the terms and conditions of the agreement to sell?

- ii. Whether the complainant is entitled for possession along with prescribed interest for delay in possession?
- iii. Whether the respondent should complete the construction as soon as possible and there is no reasonable justification for the delay?
- iv. Whether interest cost being demanded by the respondent/developer is very higher i.e. 18% which is unjustified and not reasonable?

Reliefs sought

13. The complainant is seeking the possession of the flat along with prescribed interest per annum from the date of booking of the flat in question.

Respondent's reply

14. The respondent company is involved in the business of real estate development in Gurugram, Haryana. The respondent is a financially stable company that is not in default of its financial obligations. It is stated that the respondent is a solvent company and has the capacity both in terms of



infrastructure and financial resources to complete its project 'Canary Greens'.

15. The respondent submitted that the flat buyer's agreement was executed between the parties on 15.06.2011. Clause 38 of the said agreement provides that all disputes, between the respondent and allottee, to be resolved through arbitration to be held in Delhi. The complainant is successor in interest of original allottee and the said clause binds the complainant as well. It is stated that no provision of the said Act provides for exclusive jurisdiction of this hon'ble authority or takes away the right of the parties to render jurisdiction in arbitration tribunal.

16. The respondent 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 is at final stages of construction and the respondent shall deliver the possession of the unit in question within 12 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 respondent submitted that the complainant has not stated 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 respondent solely with intent of speculative gain/investment purposes, which gain / profit was never promised by the respondent.

18. The respondent submitted that he 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 HRERA

Rules on 28.07.2017, the interim authority insisted that we have to submit the copy of valid license no. 03 of 2009 as granted by the DTCP. Now, after the passing of Haryana Real Estate Regulatory Authority, Gurugram (Registration of Projects) Regulations 2018, the respondent was asked to file a new application before HARERA, Gurugram and accordingly a new application was filed by the respondent for registration of its project before this authority and same is presently pending since 30.04.2018.

19. The respondent submitted that the abovesaid stance of HARERA of asking the respondent to furnish the copy of valid license is though within the framework of rule 5(1) of Rules ibid but it completely overlooks the practical and existing ground level reality of transactions that are prevalent in Gurugram and in other parts of State of Haryana where license is granted to one company and project development is done by more than one company in phases. The said condition of having a valid license at the time of grant of registration certificate is nowhere contained in the Real Estate (Regulation and Development) Act, 2016 enacted by



the Central Government as well as in the draft Haryana Real Estate (Regulation and Development) Rules, 2017.

20. The respondent submitted that after filing the project registration application, opportunities have been granted to the respondent to submit the valid license copy, however, owing to non-cooperation at the end of the licensee company, M/s New India City Developers Pvt. Ltd., the license has not been renewed at the end of the licensee company. The licensee company must also be arrayed as a necessary and proper party to this complaint as without hearing the licensee company, the proper adjudication of this case cannot be possible in order to meet its logical conclusion. Further there is a clear dissonance in the provisions enshrined under the Real Estate (Regulation and Development) Act, 2016 and Haryana Real Estate (Regulation and Development) Rules, 2017 and until the same is resolved, the present matter needs to be kept pending sine die. Further till the time, the subject project did not get the registration certificate, the jurisdiction of this hon'ble authority cannot be invoked.

21. The respondent submitted that the Act does not completely cast a shadow upon the defence of genuine delays resulting in failure to deliver timely possession of properties. The respondent entered into agreement with original allottee anticipating all sorts of ups and downs in the market.
22. The respondent submitted that since 15.06.2011, they faced numerous market considerations arising as a consequence of orders from Court of Law and policies of Government, while making an endeavour to complete the project within the proposed time frame. They are as follow:
- a. 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 of the said project. 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.
 - b. There was closure of brick kilns due to the norms of procuring permission from Ministry of Environment and 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 in clause 22.

- c. 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 / companies and agencies including the supply industry and transportation industry.

23. The respondent submitted that the time period of 36 months was only proposed in the said agreement dated 15.06.2011 and it was subjected to events which were described in clause 22 of the agreement dated 15.06.2011.

24. The respondent submitted that provisions enshrined under the Real Estate (Regulation and Development) Act, 2016, seventy percent of the amount realised for the real estate project from the allottees, from time to time, shall be deposited in a separate account to cover the cost of construction and the land cost and shall be used for that purpose only. The respondent has already opened a separate account in accordance with the provisions enshrined under said Act to cover the cost of construction for the said project and in case any order of payment of compensation is passed,



the same shall be taken from the account so opened as per the Act which will surely affect and jeopardize the progress and completion of the entire project and shall also affect the interest of other allottees who are not in litigation.

25. The respondent submitted that the authority was pleased to appoint Sh. Suresh Kumar Verma on 17.01.2019 for physical verification pertaining to the said project. 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.

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-

26. With respect to the **first, second and third issue** raised by the complainant, the authority came across that as per clause 21 of the agreement to sell dated 15.06.2011, the possession of the allotted unit was to be delivered within a period of 36 months plus 6 months' grace period from the date of execution of agreement. The grace period of 6 months is allowed to the respondent due to the exigencies beyond the control of the respondent. The relevant portion of said clause is reproduced below:

"...the physical possession of the said unit is proposed to be delivered by the Company to the Allottee within 36 months from the date of execution of this agreement. The allottee further agrees that the Company shall additionally be entitled to a period of 6 months' grace period after the expiry of the said commitment period to allow for unforeseen delays beyond the reasonable control of the company including but not limited to delays in obtaining the occupation certificate/completion certificate, etc., from the competent authority..."

Accordingly, the due date of delivery of possession in terms of the abovementioned clause comes out to be 15.12.2014 and the possession has been delayed by 4 years 8 months 21 days till date of decision. However, the respondent by not delivering the possession of the unit till date has breached the terms and conditions of the agreement to sell dated

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Accordingly, the due date of delivery of possession in terms of the abovementioned clause comes out to be 15.12.2014 and the possession has been delayed by 4 years 8 months 21 days till date of decision. However, the respondent by not delivering the possession of the unit till date has breached the terms and conditions of the agreement to sell dated

15.06.2011 which is in violation of section 11(4)(a) of the Act ibid. As the promoter has failed to fulfil its obligation under section 11(4)(a) of the Act, the promoter is liable under section 18(1) proviso of the Act read with rule 15 of the Rules ibid, to pay interest to the complainant, at the prescribed rate i.e. 10.45% p.a., for every month of delay till the offer of possession.

27. With respect to the **fourth issue** raised by the complainant, the respondent is charging exorbitant interest at the rate of 18% per annum for the delayed payment by the complainant for the period of delay in terms of clause 8 of the said agreement. However, the delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month for the period of delay as per clause 21 para 2 of the agreement to sell 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:

"...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

28. 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 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.

29. As regards of the arbitration clause in the said agreement, the authority is of the considered opinion that it has been held in judgments of the Hon'ble Supreme Court, particularly in

National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the flat buyer's agreement between the parties had an arbitration clause.

30. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Supreme Court - in civil appeal no. 23512-23513 of 2017 and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.


31. By virtue of clause 21 of the agreement to sell dated 16.06.2011 for unit no. 0302, 3rd floor, tower T 7 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 agreement i.e. 15.06.2011 plus

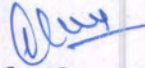
six months grace period which comes out to be 15.12.2014. The respondent has failed to deliver the possession of the unit in time. As such the complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum w.e.f. 15.12.2014 as per the provisions of the Act *ibid*.

Decision and directions of the authority

32. After taking into consideration all the material facts 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 respondent in the interest of justice and fair play:
- i. The respondent is directed to pay interest at the prescribed rate of 10.45% per annum on the amount deposited by the complainant with the promoter from the due date of possession i.e. 15.12.2014 till the actual delivery of possession.
 - 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 monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.

- iii. Complainant shall pay the outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The promoter shall not charge anything from the complainant which is not a part of the agreement to sell.
 - v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as being granted to the complainant in case of delayed possession.
33. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and for that separate proceeding will be initiated under the Act. The registration branch is directed to take necessary action in this regard against the respondent. A copy of this order be endorsed to the registration branch.
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: 05.09.2019

