

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

**Complaint no. : 2356 of 2018**  
**First date of hearing: 30.05.2019**  
**Date of decision : 05.09.2019**

1. Mr. Shanti Swaroop Gupta  
2. Mrs. Lakshmi Devi Gupta  
R/o. C-34, Old DLF Colony, Gurugram.

**Complainants**

Versus

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

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE:**

Shri Sushil Yadav Advocate for the complainants  
None for the respondent

**ORDER**

1. A complaint dated 18.12.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2016 by the complainants, Mr. Shanti Swaroop Gupta and Mrs. Laxmi Devi Gupta, against the

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respondent M/s Today Homes & Infrastructures Pvt. Ltd., in respect of agreement to sell dated 22.06.2011 for unit no. 8, 15<sup>th</sup> floor, tower T1, admeasuring 1,275 sq. ft. in the respondent no. 1's project, namely 'Today Canary Greens' located at Sector 73, Gurugram for not delivering the possession by the due date which in violation of obligation of promoter under section 11(4)(a) of the Act *ibid*.

2. Since the agreement to sell was executed on 22.06.2011 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 obligation 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	'Today Canary Greens' Sector-73, Gurugram, Haryana.
2.	RERA registered / not registered	<b>Not Registered</b>
3.	Nature of real estate project	Residential complex
4.	Total area of the project	21.55 acres
5.	Date of booking	20.11.2010 (Annx 1)



6.	Allotted unit no.	8, 15 <sup>th</sup> floor, tower T1
7.	Unit measuring area	1,275 sq. ft.
8.	Date of execution of agreement to sell	22.06.2011( <b>Annx 2</b> )
9.	Total consideration	Rs. 55,84,875/-( <b>Annx 1</b> )
10.	Total amount paid by the complainant till date	Rs.47,98,166.52/- ( <b>Annx 1</b> )
11.	Percentage of consideration paid	86% approx.
12.	Payment plan	Construction linked plan
13.	Due date of delivery of possession as per the agreement dated 22.06.2011	<b>22.12.2014</b> <b>Clause 21</b> – possession to be delivered within 36 months of execution of agreement plus 6 months grace period.
14.	Delay of number of months/ years till 05.09.2019 (date of decision)	4 years, 8 months and 14 days
15.	Penalty clause as per agreement to sell	Clause 21, para 2 of the agreement i.e. Rs.5/- per month per sq. ft. for the period of delay.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. An agreement to sell dated 22.6.2011 is available on record for the aforesaid unit. As per clause 21 of the agreement dated 22.06.2011, possession of the said unit was to be delivered by 22.12.2014 but the respondent has neither delivered the possession of

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unit nor paid the compensation at the rate of Rs. 5/- per sq. ft. per month for every month of delay. Therefore, the promoter has not fulfilled his committed liability as on date.

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

**Facts of the case:-**

6. Briefly put facts relevant for the disposal of the present complaint are that the respondents gave advertisement in various leading newspapers about their forthcoming project named "Today Canary Greens", Sector-73, Sohna Road, 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 complainants jointly, booked a flat measuring 1,275 sq. ft. in aforesaid project of the respondents for total sale consideration is Rs.55,84,875/-.

7. The complainants made total payment of Rs.49,33,579/- to the respondent vide different cheques on different dates. As per agreement to sell, the respondent had allotted a unit/flat no. 1508 in Tower-T1 having super area of 1,275 sq. ft. to the complainants. As per clause 21 of the said 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 dated 22.6.2011 with an extended period of six months.
8. The complainants submitted that they regularly visited the site but were surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainants. Despite receiving 95% approximately payments on time and repeated requests and reminders over phone calls and personal visits of the complainants, the respondents has failed to deliver the possession of the allotted flat to the complainants within stipulated period.
9. The complainants alleged that the construction of the block in which the complainants flat was booked was not

completed within time for the reasons best known to the respondents which clearly shows that ulterior motive of the respondents was to extract money from the innocent people fraudulently.

10. Due to this omission on the part of the respondent, the complainants have been suffering from disruption on their living arrangement, mental torture, agony and also continues to incur severe financial losses. As per clause 23 of the agreement to sell 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 flat. It is however, pertinent to mention here that a clause of compensation at such a nominal rate of Rs.5/- per sq.ft. per month for the period of delay is unjust and the respondent has exploited the complainants 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 buyers agreement and offered to pay a sum of Rs.5/- per sq.ft for every month of delay. If we calculate the amount in terms of financial charges it comes to approximately

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@ 2% per annum rate of interest whereas the respondent charges 18% per annum interest on delayed payment.

11. On the ground of parity and equity the respondent also be subjected to pay the same rate of interest hence the respondent is liable to pay interest on the amount paid by the complainants from the promise date of possession till the flat is actually delivered to the complainants. Hence, the complainants have filed the present complaint before this authority.

**Issues to be decided:-**

- a. Whether the developer has violated the terms and conditions of the agreement to sell?
- b. Whether the complainants are entitled for possession along with prescribed interest for delay in possession?
- c. Whether the respondent should complete the construction as soon as possible and there is no reasonable justification for the delay?
- d. Whether interest cost being demanded by the respondent/developer is very higher i.e. 18% which is unjustified and not reasonable?

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**Relief sought: -**

- Direct the respondents to handover the possession of the flat along with prescribed interest per annum from the date of booking of the flat in question.

**Respondent's reply: -**

12. The respondent submitted that the flat buyer's agreement was executed between the parties on 22.06.2011. Clause 38 of the said agreement provides that for all disputes between the respondent and allottee to be resolved through arbitration to be held in Delhi. The complainants are successor in interest of original allottee and the said clause binds the complainants 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.
13. The respondent submitted that the relief sought by the complainants 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

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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.

14. The respondent submitted that the complainants does not state as to any difficulty which is being faced by the complainants 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.

15. The respondent submitted that he filed its application for RERA project registration qua project -"Canary Greens" before interim Real Estate Regulatory Authority at Panchkula.

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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.

16. 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 realty 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,

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2016 enacted by the Central Government as well as in the draft Haryana Real Estate (Regulation and Development) Rules, 2017. Further 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.

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17. 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.

18. The respondent submitted that since 06.06.2011, 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

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- 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.
- d. The respondent submitted that the time period of 36 months was only proposed in the said agreement dated 22.06.2011 and it was subjected to events which were described in clause 22 of the agreement dated 22.06.2011.
- e. 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

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that purpose only. The respondent has already opened a separate account in accordance with the provisions enshrined under Real Estate (Regulation and Development) Act, 2016 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.

19. 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

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the figure of 46% as was mentioned in the local commissioner's report.

**Determination of issues: -**

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

20. With respect to **all the issues** raised by the complainants, the authority came across that as per clause 21 of the agreement to sell dated 22.06.2011 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 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 by

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applying the above mentioned clause comes out to be 22.12.2014,

but the respondent by not delivering the possession of the unit till date has breached the terms and conditions of the agreement dated 22.06.2011 which is in violation of section 11(4)(a) of the Act *ibid.* and the possession has been delayed by four and a half years approx. till date.

21. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month for the period of delay as per clause 23 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."*

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With regard to compensation, the complainant has made a statement before the authority that complainant is not appearing for compensation and he reserves the right to seek compensation before the adjudicating officer. Since, there is a delay of more than 4 years, so the respondent is liable to pay delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum for every month of delay in terms of section 18(1) proviso of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017 from the due date of delivery of possession till the offer of possession.

**Findings of the authority: -**

22. 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 complainants 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 for all

purpose with offices situated in Gurugram. 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.

23. Regarding the issue of arbitration clause in the agreement, which has been raised by the respondent in their reply, the authority is of the considered opinion that it has been held in a catena of 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 agreement between the parties had an arbitration clause.

24. 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

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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.

25. Project is not registered with the authority. 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 to show cause as to why a penalty of 10% of the total project cost may not be imposed. Registration branch is directed to the needful.

26. As the respondent - promoter has failed to fulfil his obligation by not delivering the possession on due date which is in violation of section 11(4)(a) of the Act, hence, the promoter is liable to pay delay possession charges for every month of delay at the prescribed rate of interest to the complainants under section 18(1) proviso of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.

**Decision and directions of the authority:-**

27. 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 parties in the interest of justice and fair play:

- i. The respondent is directed to pay delayed possession charges @ 10.45% p.a. on the paid amount to the complainants from the due date of delivery of possession i.e. 22.12.2014 till the date of actual offer of possession.
- ii. The arrears of interest so accrued @ 10.45% p.a. from due date i.e. 22.12.2014 till the date of order, shall be paid to the complainants within 90 days from the date of this order. Thereafter, monthly interest at prescribed rate be paid on or before 10<sup>th</sup> of each subsequent month.
- iii. Complainants are also directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period of possession. Interest on the due

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payments from the complainant 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 the delayed possession.

iv. The respondent - promoter shall not charge any amount/ charges from the complainants which is not a part of the agreement to sell.

28. The order is pronounced.

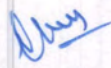
29. Case file be consigned to the registry.

  
(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 05.09.2019

  
(Subhash Chander Kush)

Member



Judgement uploaded on 11.09.2019