



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

Complaint no. : 2203 of 2018
Date of first hearing: 30.05.2018
Date of decision : 05.09.2019

Mrs. Mohan Murari
R/o. E-4, Sector-5, RSP, Rourkela
Odisha. **Complainant**

Versus

M/s. Today Homes and Infrastructure Pvt.
Ltd.
Registered office: Callidora Marketing Site,
Sector-73, behind DPG College, Subhash
Chowk, Gurugram-122002 **Respondent**

CORAM:

Shri Samir Kumar **Member**
Shri Subhash Chander Kush **Member**

APPEARANCE:

Shri Sushil Yadav Advocate for the complainant
Shri Amit Singh Advocate for the respondent

ORDER

1. A complaint dated 18.12.2018 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, 2017 by the complainants Mrs. Mohan Murari, against the promoter M/s Today Homes and Infrastructure Pvt. Ltd., on account of violation of the clause 21 of agreement to sell executed on 24.06.2011, in respect of flat



measuring 1275 sq. ft. super area bearing no. T1 0208, 2nd floor, tower T 1 of the project, namely "Canary Greens" situated in 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 has been executed on 24.06.2011, i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligations 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	"Canary Greens", Sector 73, Gurugram.
2.	Total area	21.55 acres
3.	DTCP license no.	Not available
4.	Nature of real estate project	Group housing colony.
5.	Flat/unit no.	0208, 2 nd floor, tower T 1
6.	Measuring area of the allotted flat	1275 sq. ft.
7.	RERA Registered/ unregistered	Not registered
8.	Date of execution of agreement to sell	24.06.2011 (as per agreement to sell dated)
9.	Payment Plan	Construction linked payment plan (Pg.24 of the complaint)
10.	Basic sale price of the allotted unit	Rs.45,14,137.50/-

11.	Total consideration as per payment plans	Rs. 55,09,012.50/- including taxes (Pg.24 of the complaint)
12.	Total amount paid by the complainants till date	Rs. 47,43,141/- (as per Pg.07 of the complaint) Rs. 48,53,839/- (as per receipts annexed)
13.	Due date of delivery of possession as per clause 21 of agreement to sell (36 months + 6 months grace period from the date of execution of agreement)	24.12.2014 Note:- due date of handing over possession is calculated from the date of execution of agreement i.e. 24.06.2011
14.	Delay in handing over possession till date of decision i.e. 05.09.2019	4 years, 08 months and 12 days
15.	Penalty clause as per clause 21 para 2 of agreement to sell dated 24.06.2011	Rs.5/- per sq. ft per month for the entire period of such delay

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. An agreement to sell dated 24.06.2011 is available on record for the aforesaid flat according to which the possession of the same was to be delivered by 24.12.2014. Neither the respondent has delivered the possession of the said unit to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft. per month for every month of delay as per clause 21 para 2 of agreement to sell. Therefore, the promoter has not fulfilled his 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 its counsel appeared on 30.05.2019.

FACTS OF THE COMPLAINT

6. The complainants submitted that the respondent 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 promises and undertakings given by the respondent in the aforementioned advertisements Rahul Sindhwani, booked a flat measuring 1275 sq.ft. in aforesaid project of the respondent for total sale consideration of Rs.55,09,012/- which includes BSP, car parking, IFMS, club membership, PLC etc. Thereafter, the complainants with the consent and permission of respondents got endorsed the unit in their name.
7. The complainants submitted that they made payment of Rs.47,43,141/- to the respondent vide different cheques on different dates.
8. The complainants submitted that as per agreement to sell, the respondent had allotted a unit/flat bearing no.0208 in tower-T1 having super area of 1275 sq. ft. to the complainants. As per para 21 of agreement to sell, the respondents had agreed



to deliver the possession of the flat within 36 months from the date of signing of the agreement to sell dated 24.06.2011 with an extended period of six months.

9. The complainants submitted that 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. The complainants also submitted that a clause of compensation at such nominal rate of Rs.5/- per sq.ft per month for the period of delay is unjust and the respondent has exploited them by not providing the possession of the flat even after a delay from the agreed possession plan. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. The complainants submitted that the respondent has incorporated the clause in one sided in buyer's agreement.
10. The complainants submitted that they have requested the respondent several times on making telephonic calls and also personally visiting the offices of the respondent either to deliver possession of the flat in question along with prescribed interest on the amount deposited by the complainants, but the respondent has flatly refused to do so.

ISSUE RAISED BY THE COMPLAINANT ARE AS FOLLOWS:

- i. Whether the developer has violated the terms and conditions of the agreement to sell thereby delaying possession?



- ii. Whether the complainants are 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 the interest cost being demanded by the respondent is very high i.e. 18% which is unjustified and unreasonable?

RELIEFS SOUGHT :-

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

REPLY ON BEHALF OF RESPONDENT:

11. 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'.
12. The respondent submitted that the flat buyer's agreement was executed between the parties on 24.06.2011. 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 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.

13. 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.

14. The respondent submitted that the complainant do not state 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.

15. The respondent 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 the respondent 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, 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.

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 28.02.2012, 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.

- 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.

19. The respondent submitted that the time period of 36 months was only proposed in the said agreement dated 24.06.2011 and it was subjected to events which were described in clause 22 of the agreement dated 24.06.2011.

20. 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 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.

21. The respondent submitted that the authority was pleased to appoint local commissioner 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 complainants, and reply by the respondent and perusal of record on file, the authority decides the issues raised by the parties as under:

- i. With respect to **all issues**:- as per clause 21 of agreement to sell dated 24.06.2011, the possession of the flat was to be handed over within 36 months + 6 months grace period from the date of execution of agreement to sell. Therefore, the due date of handing over the possession shall be computed from 24.06.2011. Accordingly, the due date of possession was 24.12.2014 and the possession has been delayed by 4 years, 08 months and 12 days till date of decision. As the promoter has failed to fulfil its obligations under section 11(4)(a), the promoter is liable under section 18(1) proviso of the Act *ibid* read with rule 15 of the rules *ibid*, to pay interest to the complainant, at the prescribed rate i.e. 10.45 %, for every month of delay till the handing over 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 complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory



Authority, Gurugram shall be entire Gurugram District for all purpose for promoter projects 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. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter. The complainant requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions of the Act and to fulfil its obligations.

24. As regards issue of the arbitration clause raised by the respondent in reply as envisaged in 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.

25. 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.

26. By virtue of clause 21 of the agreement to sell dated 24.06.2011 for unit no. 0208, 2nd floor, tower-T1 in project "Canary Greens" Sector 73, Gurugram possession was to be handed over to the complainants within a period 36 months from the date of execution of agreement i.e. 24.06.2011 plus 6 months grace period which comes out to be 24.12.2014. There is delay of 4 years, 08 months and 12 days to deliver the unit to the complainant. Complainant has already paid Rs. 47,43,141/- to the respondent against a total sale consideration of Rs. 55,09,012/-. As such the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f. 24.12.2014 as per provisions of section 18(1) of the Act till the actual offer of possession

DECISION AND DIRECTIONS OF THE AUTHORITY:-

27. 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 issue direction to the respondent:


- 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. 24.12.2014 up to the date of offer 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.
28. As the project is registerable and has not been registered by the promoter, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent. A copy of this order be endorsed to registration branch for further action in the matter.
29. The order is pronounced.
30. Case file be consigned to the registry.



HARERA
GURUGRAM

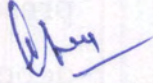
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31. Copy of this order be endorsed to registration branch.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Subhash Chander Kush)

Member

Dated: 05.09.2019

Judgement uploaded on 10.10.2019

SANDEEP BHUCKAL

LEGAL ASSISTANT

HARERA
GURUGRAM