

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

**Complaint No. : 2026 of 2018**  
**First date of hearing: 30.04.2019**  
**Date of Decision : 04.09.2019**

1. Mrs. Vandana Malani, and
2. Mr. S.K. Malani.

**Address:-** P103/74, Army Hospital R & R,  
Near Dhoula Kuan Metro Station, Delhi  
Cantt.  
New Delhi- 122002.

**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:**

Dr. K. K. Khandelwal  
Shri Samir Kumar  
Shri Subhash Chander Kush

**Chairman**  
**Member**  
**Member**

**APPEARANCE:**

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

**ORDER**

1. A complaint dated 29.11.2018 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. Vandana

Malani and Mr. S.K. Malani, against the respondent M/s Today Homes & Infrastructures Pvt. Ltd. (promoter), in respect of agreement to sell dated 13.06.2011 for unit no. 3, 5<sup>th</sup> floor, tower T 7, admeasuring 1,640 sq. ft. in the respondent no. 1's project, namely 'Today Canary Greens' located at Sector 73, Gurugram for not delivering the possession by due date which in violation of obligation of promoter under section 11(4)(a) of the Act.

2. Since, the agreement to sell was executed on 13.06.2011 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, Sohna Road, Gurugram, Haryana.
2.	RERA registered / not registered	<b>Not Registered</b>
3.	Nature of real estate project	Group housing colony
4.	Total area of the project	21.55 acres
5.	Date of booking	28.10.2010 (as per the complainant's version)

6.	Allotted unit no.	3, 5 <sup>th</sup> floor, tower T7
7.	Unit measuring area	1,640 sq. ft.
8.	Date of execution of agreement to sell	13.06.2011 ( <b>Annx I</b> )
9.	Total consideration	Rs. 69,78,080/- ( <b>Pg.29 of the complaint</b> )
10.	Total amount paid by the complainants till date	Rs.67,59,769/- (as per the receipts attached)
11.	Percentage of consideration paid	97% approx.
12.	Payment plan	Construction linked plan
13.	Due date of delivery of possession as per the agreement dated 13.06.2011.	<b>13.12.2014</b> <b>Clause 21</b> – possession to be delivered within 36 months from the date of execution of agreement plus 6 months grace period.
14.	Delay of number of months/ years till 04.09.2019	4 years, 8 months and 22 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 13.06.2011 is available on record for the aforesaid unit. As per clause 21 of the agreement dated 13.06.2011, possession of the said unit was to be delivered by 13.12.2014 but the respondent has neither delivered the possession of unit nor has 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 30.04.2019. The case came up for hearing on 30.04.2019, 23.07.2019 and 04.09.2019. Reply has been filed on behalf of the respondent on 23.07.2019 and the same 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 respondent gave advertisement in various leading newspapers about their forthcoming project named "Today 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 promise and undertakings given by the respondent, complainants jointly, booked a flat measuring 1,640 sq. ft. in aforesaid project of the respondents for total sale consideration is Rs.69,78,080/-.
7. The complainants made total payment of Rs.67,59,769/- to the respondent vide different cheques on different dates. As per

agreement to sell dated 13.06.2011, the respondent had allotted a flat no. 3, 5<sup>th</sup> floor in tower-T7 having super area of 1,640 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 13.06.2011 with an extended period of six months.

8. The complainant 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 their queries. Despite receiving 95% approximately payments on time and repeated requests and reminders over phone calls and personal visits of the complainants, the respondent 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 their flat was booked was not completed within time for the reasons best known to the respondent which clearly shows that ulterior motive of the respondent was to extract money from the innocent people fraudulently.

10. Due to this omission on the part of the respondents 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 said agreement 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 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 @ 2% per annum rate of interest whereas the respondent charged 18% per annum interest on delayed payment.

11. The complainants submitted that on the ground of parity and equity, the respondent should 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:-**

- i. Whether the developer has violated the terms and conditions of the agreement to sell?
- 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 interest cost being demanded by the respondent/developer is very higher i.e. 18% which is unjustified and not reasonable?

**Reliefs 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. At the outset, it is submitted that all the averments and contentions made by the complainant(s) in the present complaint, under reply, if not specifically admitted herein, be deemed to have been specifically denied and traversed.

13. The complainant(s) by suppressing the material facts have not approached this authority with clean hands in the present matter and have presented the facts of the present case in a selective & lopsided manner. The averments set out in the complaint also denote non-application of mind.

14. It is submitted that the agreement to sell was executed between the respondent and original allottee on 13.06.2011. Clause 38 of the said agreement provides for all disputes between the complainant and respondent to be resolved through arbitration to be held in Delhi. The complainant(s) are successor-in-interest of original allottee and the said clause bind the complainants as well. It is stated that no provision in Real Estate (Regulation and Development) Act, 2016 provides for exclusive jurisdiction to this authority or takes away the right of parties to render jurisdiction in an arbitration tribunal.

15. The relief sought by the complainant(s) 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 (T-7/0503) 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 authority without the jurisdiction to determine compensation / interest, by virtue of section 71 of the Act.

16. The respondent had initially 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 final HRERA Rules on 28.07.2017, the interim authority is insisting that we have to submit the copy of valid license (license no. 03/2009) as granted by the Department of Town and Country Planning. 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 before this authority and same is presently pending since 30.04.2018.

17. The above said stance of HARERA of asking the respondent to furnish the copy of valid license is though within the framework of Rule 5(1) of HARERA of 2017 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. 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.

18. Further, till the time, the subject project i.e. "Canary Greens" did not get the registration certificate from your office, the jurisdiction of this authority cannot be invoked.

19. The respondent submitted that since 13.06.2011, 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, some of which are identified herein-below

- I. 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 in 'today canary green'. 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.

- II. There was the 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 events in clause 22.
- III. 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.
20. It is to bring into the knowledge of this authority that 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 its ongoing project 'Canary Greens' and in case any order of payment of compensation is passed, the same shall be taken from the account so opened as per RERA 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 a local Commissioner Sh. Suresh Kumar Verma on 17.01.2019 for physical verification pertaining to the same project i.e. "Canary Greens". The report of the local commissioner was filed before this 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, reply of the respondent and perusal of record on file, the issue wise findings of the authority are as under-

22. 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 13.06.2011 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 applying the abovementioned clause comes out to be 13.12.2014, but the respondent by not delivering the possession of the unit till date has breached the terms and conditions of the agreement dated 13.06.2011 which is in violation of section 11(4)(a) of the Act *ibid.* and the possession has been delayed by 4 years, 5 months and 22 days.

23. 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.”*

24. 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. 10.60% p.a. for every month of delay in terms of section 18 of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017.

**Findings of the authority: -**

25. 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.

26. Regarding the issue of arbitration clause in the agreement 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.

27. 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.

28. Arguments heard.

29. 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 do the needful.

30. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso of the Act read with rule 15 of the Haryana Real Estate (Regulation and Development) Rules, 2017, to pay interest to the complainants, at the prescribed rate of 10.45% p.a. on the paid amount of the complainants for every month of delay.



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

31. 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 at the prevalent prescribed rate of interest i.e. 10.45% p.a. with effect from 13.12.22014 till the date of actual offer of possession.
- ii. The arrears of interest so accrued @ 10.45% p.a. from due date of delivery of possession till the date of order 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. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period of possession. Interest on the due payments from the complainants shall be charged at the prescribed rate of interest i.e. 10.45% p.a. by the respondent- promoter,

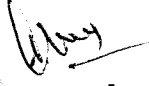
which is the same as is being granted to the complainants in the form of delayed possession charges.


iv. The respondent-promoter shall not charge anything from the complainant which is not the part of the agreement to sell.

32. The order is pronounced.

33. Case file be consigned to the registry. A copy of this order be endorsed to the registration branch.

  
(Samir Kumar)  
Member

  
(Subhash Chander Kush)  
Member

  
(Dr. K.K. Khandelwal)  
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.09.2019

judgement uploaded on 18.11.2019

**HARERA**  
**GURUGRAM**