

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

Complaint no. : 1883 of 2018
First date of hearing: 30.04.2019
Date of decision : 04.09.2019

1. Mr. Dhruv Gilani
2. Ms. Shweta Gilani
R/o: D-184, Sushant Lok, Phase 2, Sector 56
Gurugram **Complainants**

Versus

M/s Today Homes and Infrastructure Pvt. Ltd.
Regd. Office: Statesman House, 8th 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
Shri Amit Singh

Advocate for the complainants
Advocate for the respondent

ORDER

1. A complaint dated 22.11.2018 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, 2017 by the complainants Mr. Dhruv Gilani and Ms. Shweta Gilani, 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 28.12.2011, in the project 'Canary Greens' in Sector 73, Gurugram for not handing over possession by the due date i.e. 28.06.2015 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 28.12.2011, 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 obligation on the part of the promoters/respondents 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.	Nature of project	Group housing colony
3.	Area of project	21.55 acres
4.	Apartment/unit no.	05, 8 th floor, tower no. T1
5.	Flat admeasuring	1275 sq. ft.
6.	RERA registered/ not registered	Not registered
7.	Date of execution of agreement to sell	28.12.2011
8.	Payment plan	Construction linked payment plan
9.	Total sale consideration as per payment plan (statement of account 21.11.2011)	Rs.54,85,743.75
10.	Total amount paid by the complainants till date(as per statement of account dated 21.11.2017)	Rs.48,52,938/-

11.	Due date of delivery of possession as per clause 21 of agreement to sell dated 28.12.2011 (36 months + 6 months grace period from the date of execution of agreement)	28.06.2015 The grace period of 6 months has been allowed to the respondents for the delay caused due to exigencies beyond control of the respondents
12.	Delay in handing over possession till date 04.09.2019	4 years 2 months 7 days
13.	Penalty clause as per agreement to sell dated 28.12.2011. (clause 21, para 2)	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 complainants and the respondent. An agreement to sell dated 28.12.2011 is available on record for the aforesaid flat according to which the possession of the same was to be delivered by 28.06.2015. Neither the respondent has delivered the possession of the said unit to the purchaser nor has paid any compensation @ Rs.5/- per sq. ft per month for the period of such delay as per clause 21 para 2 of agreement to sell. Therefore, the promoter has not fulfilled its committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 30.04.2019, 23.07.2019 and 04.09.2019. The reply filed on behalf of the respondent on 23.07.2019 has been perused by the authority.

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 Ranbir Singh & Rajbir, booked a flat measuring 1275 sq.ft. in aforesaid project of the respondent for total sale consideration of Rs.54,85,743/- 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.48,52,938/- 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.0805 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 28.12.2011 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.

11. Issue raised by the complainants are:

- 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:

The complainants are seeking the following reliefs:

- a. 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.

Reply on behalf of respondent:

12. The respondent submitted that respondent party is a company involved in the business of real estate development in Gurugram, Haryana. The respondent party is financially stable company that is not in default of its financial obligations. It is state that the party is a solvent company and has the capacity both in terms of infrastructure and financial resources to complete its project "Canary Greens".
13. It is submitted that the agreement to sell executed between the opposite party and original allottee on 28.12.2011, in Clause 38, of the said agreement provides that for all disputes between the respondent and allottees 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.
14. The respondent submitted that the relief sought by the complainants is that of the flat as 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-8/0704) is at final stages of construction and opposite party shall deliver the possession of the unit in question within 12 months from the date of filling 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.

15. The respondent submitted that the present matter is completely beyond the jurisdiction of this hon'ble authority as the same pertains to alleged deficiency on the opposite party who is developing a project-Canary Greens, at Sector -73, District- Gurugram, Haryana and now as per the provisions contained in the Real Estate (Regulation and Development) Act, 2016 the said project is covered under the definition of an 'ongoing' for which the answering company had already filed its application for registration of the project before this hon'ble authority.
16. The respondent submitted that initially the respondent has filed the 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 interim authority as after the publication of final HRERA Rules on 28. 07.2017, the interim authority is insisting that the respondent has to submit the copy of the valid license (license no. 03/2009) as granted by the department of the Town and Country Planning.

17. The respondent submitted that since 28.12.2011, faced numerous market considerations arising as a consequence of order from the court of law and policies of government, while making an endeavour to complete the project within the proposed time- frame.
18. The respondent submitted that the work at the site had been seriously hampered as dispute had arisen with the earlier contractor who was appointed to complete civil and other work in "Today Canary Greens". 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.
19. The respondent submitted that there was the closure of brick kilns due to the norms of procuring permission from the Ministry of Environment & 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.
20. The respondent submitted that 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.
21. The respondent submitted that the time period of 36 months was only proposed in the agreement to sell dated 28.12.2011

and it was subjected to events which were described in clause 22 of said agreement. The respondent cannot be bound on to the same period without considering the circumstances which occasioned the delay in the delivery of possession to the complainants.

22. The respondent submitted that that the authority was pleased to point 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 on 20.02.2019 before this hon'ble authority which submitted that the work has been completed physically 46% approximately. It is submitted that the report was filled 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:

23. With respect to the **all issues** raised by the complainants, as per clause 21 of agreement to sell dated 28.12.2011, 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. The grace period of 6 months has been

allowed to the respondents for the delay caused due to exigencies beyond control of the respondents. Therefore, the due date of handing over the possession shall be computed from 28.12.2011. Accordingly, the due date of possession was 28.06.2015 and the possession has been delayed by 4 years 2 months 7 days till date of decision. Therefore, under section 18(1) proviso of Act, read with rule 15 of rules ibid, respondent is liable to pay interest to the complainants, at the prescribed rate, for every month of delay from the date of possession i.e. 28.06.2015 till the handing over of possession.

FINDINGS OF THE AUTHORITY

24. 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.
25. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, 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.
26. As regards issue of the arbitration proceeding 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.

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. By virtue of clause 21 of the agreement to sell dated 28.12.2011 for unit no. 05, 8th floor, 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. 28.12.2011 plus 6 months grace period which comes out to be 28.06.2015. However, the respondent has miserably failed to deliver the possession of the unit in time. There is delay of 4 years 2 months and 07 days

in delivering the unit to the complainant till date of order. As such the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f. 28.06.2015 as per provisions of proviso to section 18(1) of the Act till the actual offer of possession.

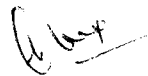
DECISION AND DIRECTIONS OF THE AUTHORITY:


29. 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. 28.06.2015 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.
30. 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.
31. The order is pronounced.
32. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.


(Samfir Kumar)
Member


(Subhash Chander Kush)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 04.09.2019