

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

Complaint no. : 1709 of 2018
Date of First hearing: 30.04.2019
Date of decision : 04.09.2019

Sh. Arun Kumar Sinha
R/o: C-2/802, PWO, Sector-43, Gurugram **Complainant**

VERSUS

M/s Today Homes and Infrastructure Pvt.
Ltd.
Regd. Office: Statesman House, 8th Floor **Respondent**
Barakhamba Road, New Delhi-110001.

CORAM:

Dr. K.K. Khandelwal **Chairman**
Sh. Samir Kumar **Member**
Sh. Subhash Chander Kush **Member**

APPEARANCE:

Sh. Sushil Yadav Advocate for the complainant
Sh. Amit Singh Advocate for respondent

ORDER

1. A complaint dated 14.11.2018 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 complainant Sh. Arun Kumar Sinha, against the promoters M/s Today homes &

Infrastructure Pvt. Ltd. in respect of unit described below in the project "Canary Greens" on account of non-fulfilment of obligations of the promoters 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, the 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 promoters/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.	Project area	21.55 acres
3.	Unit no.	01, tower-T5, 8 th floor
4.	Unit area measuring	1640 sq. ft. (super area)
5.	RERA registered/ not registered.	Not registered
6.	Nature of real estate project	Group housing colony
7.	Date of agreement to sell	24.06.2011
8.	Payment plan	Construction linked plan
9.	Total sales consideration	Rs. 70,00,220/- As per payment plan of the agreement to sell (page 35)
10.	Total amount paid by the complainant	Rs. 64,07,460/- As per receipts attached



11.	Due date of delivery of possession as per clause 21: 36 months from the date of the agreement to sell plus 6 months grace period	24.12.2014
12.	Delay in delivering possession till date of this order	4 years 8 months 11 days
13.	Penalty clause As per para 2 of clause 21 of the agreement to sell	Rs. 5/- per sq. ft. of super area of unit per month for the period of delay.

4. The details provided above has been checked on the basis of the record available in the case file provided by the complainant and respondent. An agreement to sell dated 24.06.2011 is available on record for aforesaid unit. As per clause 21 of the said agreement the possession of the unit was to be delivered by 24.12.2014, is provided in the complaint. The respondent has failed to handover the possession of the subject unit by the due date, thus the promoter has not fulfilled its committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notices to the respondent 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 has been filed by the respondent on 23.07.2019 which has been perused by the authority. The respondent through its counsel appeared on 30.04.2019.

FACTS OF THE COMPLAINT

6. The complainant submitted that the respondent gave advertisement in various leading newspapers about their forthcoming project named “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 in the aforementioned advertisements, Adwin Infratech Pvt Ltd. , booked a flat measuring 1640 sq. ft. in the aforesaid project of the respondent for total sale consideration of Rs.70,00,220/- which includes BSP, car parking, IFMS, club membership, PLC etc. and later on the aforesaid was endorsed in the name of complainant Sh. Arun Kumar Sinha.
7. The complainant submitted that he made a payment of Rs.64,07,460/- to the respondent vide different cheques on different dates.
8. The complainant submitted that as per agreement to sell the respondent has allotted a unit/flat bearing no. 0801 in tower-

T5 having super area of 1640 sq. ft. to him. As per para no. 21 of the agreement to sell, the respondent has agreed to deliver the possession of the flat within 36 months from the date of signing of the agreement to sell i.e. 24.06.2011, with an extended period of 6 months.

9. The complainant submitted that it could be seen that the construction of the block in which his flat was booked with a promise by the respondent to deliver the flat by 24.12.2014 but, it 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. The complainant submitted as per clause 23 of the agreement to sell, it was agreed by the respondent that in case of any delay, the respondent will pay to the complainant compensation @ Rs.5/- per sq. ft. per month of the super area of the flat. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here, that the respondent has incorporated the clause in one sided buyer's 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 charges 18% per annum interest on delayed payment.

11. The complainant 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 are liable to pay interest on the amount paid by the complainant from the promise date of possession till the flat is actually delivered to the complainant.
12. The complainant submitted that he has requested the respondent several times by making telephonic calls and also personally visiting the offices of the respondent to deliver possession of the flat in question along with prescribed interest on the amount deposited by him, but respondent has flatly refused to do so.

ISSUES TO BE DECIDED

13. The relevant issues raised by the complainant are as follows:
 - 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 interest cost being demanded by the respondent/developer is very higher i.e. 18% which is unjustified and not reasonable?

RELIEF SOUGHT

14. The following relief is sought by the complainant:-

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

REPLY FILED BY THE RESPONDENT

15. The respondent submitted that the respondent is a company involved in the business of real estate development in Gurugram, Haryana. The respondent is a financially stable company and has the capacity both in terms of infrastructure and financial resources to complete its project "Canary Greens".
16. The respondent submitted that the agreement to sell was executed between the respondent and original allottee on 24.06.2011. Clause 38 of the said agreement provides, that all disputes, between the respondent and the 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 in RERA Act provides for exclusive jurisdiction to this hon'ble regulatory authority or takes away the right of parties to render jurisdiction in an arbitration tribunal.

17. 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 (**T-5/0801**) 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.
18. 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 respondent who is developing the project "Canary Greens", at Sector-73, Gurugram, Haryana and now, as per the provisions contained in the RERA Act the said project is covered under the definition of an ongoing project for which the answering company had already filed its application for registration of its project before this Hon'ble authority.

19. The respondent submitted that they had initially filed its application for RERA project registration qua project "Canary Greens" before interim Real Estate Regulatory Authority, 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 insisted that they has to submit the copy of valid license (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 by the respondent for registration of its project before this hon'ble authority and same is presently pending since 30.04.2018.
20. The respondent submitted that the time period of 36 months was only proposed in the agreement to sell dated 24.06.2011 and it was subjected to events which were described in clause 22 of the agreement to sell dated 24.06.2011. They cannot be bound on to the same period without considering the circumstances which occasioned the delay in delivery of possession to the complainant.

21. The respondent submitted that it is relevant to state here that under the provisions enshrined under the Act ibid, 70% 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. It is to bring into the knowledge of this hon'ble authority that the respondent has already opened a separate account in accordance with the provisions enshrined under RERA Act 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.
22. The respondent submitted that they are debt free company and as narrated above, they has invested a huge sum of monies in this project and same is nearing possession. They are arranging funds with great difficulties and even many customers of this project has stopped making payments of due instalments as per applicable construction linked payment plan and thus it will cause immense irreparable losses to

company in case the order of payment of compensation is passed, the same are detrimental to the interests of hundreds of allottees who are not in the litigation and are expecting the possession of their respective flats from the company at the earliest.

23. The respondent submitted 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 on 20.02.2019 before this hon'ble authority which submitted that the work has been completed physically about 46% approx. 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 has 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. The same shall show and prove beyond doubt the progress made in the project and its advance stage of construction. It is therefore, requested that the same may be taken into consideration for the purpose of adjudication.

DETERMINATION OF ISSUES

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the case is proceeded and the authority decides the issues raised by the parties as under:

24. With respect to the **first and second issues** raised by the complainant, as per clause 21 of the agreement to sell the construction was to be completed within 36 months from the execution of the agreement to sell along with grace period of 6 months. Further, grace period is allowed to the promoters on account of various exigencies. The possession has been delayed by 4 years 8 months and 11 days till date of this decision.
25. The delay compensation payable by the respondent as per **clause 21 @ Rs.5/- per sq. ft per month** for the entire period of such delay on the amount paid by the allottee for such period of delay of agreement to sell is held to be very nominal and unjust. The terms of the agreement has 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."

26. Accordingly, the due date of handing over the possession comes out to be 24.12.2014. The respondent has violated the agreement to sell by not giving the possession by the due date i.e 24.12.2014 as per the agreement to sell, thus, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso of the Act ibid to be read with rule 15 of Rules ibid to pay interest to the complainant at the prescribed rate of 10.45% per annum.

27. With respect to the **third issue** raised by the complainant, after perusal of the agreement to sell the authority is of the view that the interest rate of 18% charged by the promoters on delayed payments from the complainant is unjustified and unreasonable, therefore on the grounds of parity the respondent shall charge interest at prescribed rate on the

delayed payments by the complainant and on the same hand the respondent shall also pay delay interest at prescribed rate to the complainant for the period of delay in delivery of the possession.

FINDINGS AND DIRECTIONS OF THE AUTHORITY

28. **Jurisdiction of the authority-** The project "Canary Greens" is located in Sector 73, Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint.

29. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoters 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 the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the

authority has subject matter jurisdiction along with territorial jurisdiction.

30. As per clause 21 of the agreement to sell dated 24.06.2011 for unit no. 01, tower T5, 8th floor in project "Today 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. 24.06.2011+6 months grace period, which comes out to be 24.12.2014. However, the respondent has miserably failed to deliver the possession of the unit in time. There is a delay of 4 years 8 months and 11 days in delivering the possession of the unit to the complainant. The complainant has already paid Rs. 64,07,460/- to the respondent against a total sales consideration of Rs. 70,00,220/-. 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. 24.12.2014 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till the actual offer of possession.

DECISION AND DIRECTIONS OF THE AUTHORITY

31. 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:


- i. The complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum w.e.f. 24.12.2014 as per the provisions of section 18(1) of the Act *ibid*.
 - ii. Interest on 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 is being granted to the complainant in case of delayed possession.
 - iii. 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 each subsequent month.
 - iv. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period of possession.
 - v. The promoter shall not charge anything from the complainant which is not a part of the agreement to sell.
32. Since the project is not registered, so the authority has decided to take suo-moto cognizance of this fact and directed the registration branch to take necessary action against the

respondent. A copy of this order be endorsed to the registration branch.

33. Complaint stands disposed off.
34. The order is pronounced.
35. Case file be consigned to the registry.


(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 20.11.2019

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