

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

Complaint no.: 2757 of 2019
Date of first hearing: 18.09.2019
Date of decision : 22.01.2020

Sh. Amit Arora.
R/o. B-2, Surajmal Vihar,
New Delhi-110092.

...Complainant

Versus

1. M/s Tashee Land Developers Pvt. Ltd.
2. M/s KNS Infracon Private Limited
Address: 517A Narain Manzil, 23
Barakhamba Road, Connaught Place,
New Delhi-110001.

...Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Aman Vivek
None

Advocate for the complainant
For the respondents

ORDER

1. A complaint dated 02.07.2019 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. Amit Arora against the promoters M/s Tashee Land Developers Pvt. Ltd. and M/s KNS Infracon Private Limited in respect of flat purchased by the complainant from the initial buyer in the project 'Capital Gateway',

Sector 111, Gurugram on account of violation of section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer's agreement was executed on 22.01.2013, 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 contractual obligation 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 project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:-

1.	Name and location of the project	"Capital Gateway" in Sector 111, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Total area of the project	10.462 acres
4.	flat no.	203, 2 nd floor, tower 'D'
5.	Unit area	1695 sq. ft.
6.	Registered/ not registered	Registered vide no. 12 of 2018 dated 10.01.2018 (for



		phase-I, tower A to G and phase II Tower H to J)
7.	Revised date of completion as per RERA registration certificate	31.12.2020 (for phase I) 31.12.2021(for phase II Tower H to J)
8.	DTCP license no.	34 of 2011 dated 16.04.2011 valid/renewed upto 15.04.2019.
9.	Date of transfer of booking in favour of complainant	18.01.2013 (Pg.12 of the complaint)
10.	Date of flat buyer's agreement	22.01.2013 (Pg.15 of the complaint)
11.	Total consideration	Rs. 70,86,837/- (as per summary details at Pg. 47 of the complaint)
12.	Total amount paid by the complainant	Rs. 66,16,327/- (as per summary details at Pg. 47 of the complaint)
13.	Payment plan	Construction linked payment plan
14.	Due date of delivery of possession [Clause 2.1- 36 months' from date of sanction of building plans and other necessary government approvals thereon, i.e.07.06.2012 (as per building plan approval) + 180 days' grace period]	07.12.2015 Note: No approval of building plans is annexed with the file. The aforesaid date for approval of building plan has been drawn from the project registration record.
15.	Demand letter for increase in super area of 179 sq. ft.	18.02.2017 (Pg. 55 of the complaint)
16.	Delay of number of months/ years up till the date of order	4 years, 1 month and 15 days.



		[Note: The possession has not been given till date.]
17.	Penalty clause as per flat buyer's agreement dated 22.01.2013	Clause 2.3- Rs. 5/- per sq. ft. per month for every month of delay

4. The details provided above have been checked on the basis of the record available in the case file. A flat buyer's agreement dated 22.01.2013 is available on record, according to which the possession of the same is to be delivered by 07.12.2015. However, the respondent has neither delivered the possession till date nor paid the penalty amount for delay as per the terms of agreement dated 22.01.2013.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The case came up for hearing on 18.09.2019, 21.11.2019 and 22.01.2020. The reply has been filed by the respondent on 15.07.2019 and the same has been perused by the authority.

Facts and submissions of the complaint: -

6. Briefly put facts relevant for the disposal of present complaint and submissions made by the complainant are as under: -

- i. That the complainant has purchased the unit no. D-203, 2nd floor, Tower D, admeasuring 1695 sq. ft. in the



- project in question from the initial purchaser namely Mr. Charles Devlin D'Costa which was transferred in the name of complainant.
- ii. Thereafter, the complainant entered into flat buyer agreement with the respondent on 22.01.2013. The terms and conditions of the agreement were completely one sided and unjustified in nature.
- iii. The complainant submitted in its complaint that he has made a total payment of Rs. 59,66,327/- i.e. 95% of the total consideration which was duly received and acknowledged by the respondent.
- iv. As per the flat buyer's agreement, the possession of the unit was to be given by 12.04.2016 i.e. within 45 months from the date of sanction plans or excavation per clause 2.9 of flat buyer agreement. Thus, the project should have been completed and possession ought to have been given to allottees including the complainant in adherence to respondent's own commitment and obligation.



- v. The respondent was demanding payments with respect to delay payments made by the initial buyer which is outright violation of right of the complainant. The complainant under duress made a payment of Rs. 1,50,000/- for the delay payments made by the initial buyer. This payment was supposed to be charged from the initial buyer and not from the complainant.
- vi. That respondents have already issued the demand for Rs.296831/- on account of "completion of internal brick work and plaster" which was paid by the complainant. Thereafter another demand was raised vide dated 17.05.2016 amounting Rs.2,87,856/- on account of previous balance "completion of internal brick work and plaster" despite the fact the complainant has already paid such demand. The complainant has sent various letter and emails in this regard but the respondent chose not to reply. Further such demands are unlawful and illegal which show that the respondent is trying to cheat the complainant. Therefore, this demand of Rs.2,87,856/- should be set aside.

vii. That the respondent has unilaterally increased the super area from 1695 sq. ft to 1874 sq. ft. without the consent of the allottee vide intimation letter dated 18.02.2017.

viii. That the respondent has failed to deliver the possession of the unit as promised despite repeated reminders and regular follow-ups by the complainant.
Hence, this complaint.

7. In the declaration the complainant has stated that he does not intend to withdraw from the project and sought possession of the unit in question.

Reliefs sought:-

- a) Direct the respondent to handover the possession of the unit in question in a habitable condition with all amenities alongwith delay interest as per HRERA Rules;
- b) Issue directions to the respondent to provide approvals from the competent authority with respect to unilateral increase in the super area of the unit;
- c) Issue directions to the respondent to waive the interest on delay penalty on payments made by the initial buyer;



d) Issue direction to the respondent to set aside the demand letter for Rs. 2,87,856/- showing as balance amount payable which was never raised. Further demand for enhancement of area should be set aside.

Respondent's reply: -

8. The submissions made in the reply in brief -

- i. The present complaint is devoid of merits and hence not maintainable and the same is liable to be dismissed. The complainant has miserably failed to adumbrate any illegality on part of the respondent.
- ii. That the complainant has not approached this forum with clean hands and has filed this complaint to take advantage of the current market scenario and the prejudiced perception of the builders in the eyes of the public and the wave of litigation against the builders in India.
- iii. That the construction at the project site is going on in full swing. The project is nearing completion and almost ready for possession. The filing of present complaint at this belated stage for the relief sought is not maintainable.



- iv. That the respondent has already formally applied for the completion certificate (reference no. 4553 date 25.02.2019), of Phase-I of "Capital Gateway" at Sector111, Gurugram. It is anticipated that thereafter and subject to the receipt of the said certificates and approvals, the apartments in Tower will be ready for delivery very shortly in year 2019 itself.
- v. That the sub-structure (including the excavation, laying of foundation, basement, waterproofing of sub structure) and superstructure of the building (including the stilt, walls on floor, staircases, lift wells and lobbies) has been completed 100% long back. Further, the lifts have been now installed in all towers of Phase 1 and the mechanical work, electricity including the wiring and plumbing work, internal plastering / painting of walls, external and internal wall tiling has also been finished for more than 90% and is nearing completion. Currently, the doors and window panels are being installed and the internal entrance lobby is about to be finished.
- vi. That while there are allegations by customer of some delay in the respondent's project and as a result, proceeded with



institution of RERA proceedings before the Authority, which is being defended by the petitioner. The respondent was faced with unprecedented events which lead to the delay in the completion of the construction of this project (Capital Gateway).

- vii. That any delays in the execution of works have occurred largely on account of force majeure / reasons beyond the control of the respondent which could not have been avoided or prevented by exercise of reasonable diligence or despite the adoption of reasonable precautions and/ or alternative measures. In any event, consumer contracts provide for contractual penalties payable, to compensate consumers on account of any inexcusable delay which are evaluable at the time of delivery of possession.
- viii. That at the time of execution of the flat buyers agreement, it was categorically agreed between the parties that they shall be bound by the terms thereof and that in the event of its breach the remedies as contained therein shall be readily available to either of the parties. Therefore, it is clearly evident from clause 2.3 and 2.9 of the agreement between the



parties that the answering opposite party was liable to hand over the possession of the property to the complainant within a period of 45 months from the date of the sanction of the building plans of the said colony, i.e., Capital Gateway at Sector III, Gurugram, Haryana. The remedy in the event of delay has also been duly envisaged in the said clause of the agreement which has been accepted, agreed upon and duly signed by both the parties. As per clause 9 ("Force Majeure") of the agreed terms of the flat buyer's agreement, it reads that-

"The First Party (Confirming Party shall not be held responsible or liable for not performing any of its obligations or undertaking provided for in this Agreement if such performance is prevented due to Force Majeure."

(Note: The agreement annexed with the complaint does not have the page containing clauses 7.3 - 8.2)

ix. In the performance of the terms in the agreement, i.e., the possession of the respective properties, the respondent were faced with the below listed unprecedented events which lead to the delay in the completion of the construction of this project (Capital Gateway). These events were:

- a. the construction work was first disrupted in year 2016 when the construction was put on hold under the



directions of the Delhi Government and its neighbouring States owing to the alarming and unprecedented rise in the level of air pollution post Diwali (30.10.2016 and again in October 2017). The demobilizing and remobilizing activity lead to a few months' delay in the construction work;

- b. The same was immediately followed by surprise decision of the Indian Government when on 08.11.2016, the Government of India announced the demonetization of all Rs. 500 and INR 1,000 bank currencies and directly affected the liquidity to pay the construction workers. The unforeseen step undertaken by the Government adversely hit the productivity and brought the construction work at the site at a complete halt. This disabled the payments to the construction workers and discouraged the availability of materials and machinery for the continuation of the work at the site. When the work started again, there was acute shortage of workforce, which compounded the delay to the present situation.
- c. All these events lead to a few months delay and therefore stymied the progress and delayed the date of completion of construction.
- ix. There is no deficiency in services on the part of respondent and the instant complaint is liable to be dismissed.



Findings of the Authority:-

9. After considering the facts submitted by the complainant, respondents and perusal of record on file, it is found that as per clause 2.1 of the flat buyer's agreement executed on 22.01.2013, the possession of the flat in question should have handed over within 36 months from date of sanction of building plans and other necessary government approvals thereon, i.e. 07.06.2012 (as per approval of building plan) + 180 days' grace period, i.e. by 07.12.2015. Thus, the respondents breached the agreement by not completing the construction and not delivering the possession which is in violation of statutory obligation under section 11(4)(a) of the Act.

10. However, the project in question is registered with the authority wherein the revised date of completion as undertaken by the respondent is 31.12.2020. Thus, keeping in view the status of the project and other intervening circumstances, the authority is of the considered opinion that, the complainant is entitled to delayed possession charges at the prescribed rate of 10.20% per annum for every month of delay from the due date of possession till the date of offer of possession.

Decision and direction of the Authority: -

11. The Authority exercising its power under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions: -
- (i) The respondent is duty bound to pay the interest at the prescribed rate i.e. 10.20% p.a. for every month of delay from the due date of possession i.e. 07.12.2015 till the offer of possession.
- (ii) The arrears of interest accrued so far from due date of delivery of possession i.e. 07.12.2015 till the date of order shall be paid to the complainant within 90 days from the date of this order. Thereafter, monthly interest at the prescribed rate of 10.20% p.a. be paid on or before 10th of each subsequent English calendar month.
12. The order is pronounced.
13. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: - 22.01.2020.

