

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

Complaint no. : 1948 of 2019
Date of First hearing: 18.09.2019
Date of decision : 03.01.2020

Smt. Kaushalya Toshniwal
R/o: House no. 31/32-C, Suncity Delight,
Behind Celebration Mall, Bhuwana, Udaipur,
Rajasthan - 313001

Complainant

Versus

1. Capital Skyscraper Private Limited
Address: C-96, Panchsheel Enclave,
New, Delhi 110017
2. French Buildmart Private limited
Address: N-8, Ground Floor, Panchsheel
Park, New Delhi

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Smt. Shivali
Shri Shagun Singla

Advocate for the complainant
Advocate for the respondents

ORDER

1. A complaint dated 06.05.2019 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 Smt. Kaushalya



Toshniwal against the promoter, M/s Capital Skyscraper Private Limited and French buildtech Pvt. Ltd. in respect of apartment/unit described below in the project "The City Scape", Sector 66, Gurugram on account of violation of the section 11(4)(a) of the Act *ibid*.

2. Since, the buyer's agreement has been executed on 13.05.2014 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 complaint are as under: -

1.	Name and location of the project	"The City Scape", Sector 66, Gurugram
2.	DTCP license no.	43 of 2010 dated 08.06.2010
3.	Name of licensee	FRENCH BUILD MART PVT LTD
4.	Nature of real estate project	Commercial Complex
5.	Flat/unit no.	021, Ground Floor, Phase-1
6.	Project Area Measuring	2.0229 acres (approx)
7.	Measuring area of the allotted flat	542 sq. ft.

8.	RERA Registered/ unregistered	Registered vide no. 02 of 2018. Dated 01.01.2018
9.	Date of completion as per RERA registration certificate.	31.12.2018
10.	Date of execution of apartment buyer's agreement	13.05.2014
11.	Payment Plan	Construction linked payment plan (Pg.73 of the complaint)
12.	Total consideration as per statement of accounts cum invoice	Rs. 5,027,050/-including taxes (Pg.73 of the complaint)
13.	Total amount paid by the complainants till date	Rs. 42,61,866/- (as per form CRA on page 24)
14.	Date of excavation as per demand letter	12.08.2013 (Pg. 94 of the complaint)
15.	Due date of delivery of possession as per possession clause 7(a) and 7(b) of the agreement. Note - the due date has been calculated from the date of excavation	12.02.2017 (Note - 36 months plus 180 days grace period from the date of commencement of construction of the project)
16.	Delay in handing over possession till date 03.01.2020	2 year 10 months and 22 days

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Despite service of notice the respondent neither appeared nor filed their reply to the complaint therefore their right to file reply



has been struck off and case is being proceeded ex-parte against the respondent.

Facts of the case :-

5. The complainant submitted that the respondent no. 1 is in the business of development of real estate project, represents itself as one of the flagship Company having its Registered Office at N-8, Panchsheel Park, New Delhi--110017 and is competent to defend the complaint.
6. The complainant submitted that the respondent company through their representative had approached the complainant and represented that the respondents commercial project name "**The City Scape**" will effectively serve the purposes of complainant and has best of the amenities.
7. The complainant submitted that the respondent company claimed that they have development agreement with respondent no. 2 who is the absolute owner of the impugned project land measuring 2.0229 acres (approx.) situated at Maidawas, Sector-66, Gurguram, Haryana. Since, the respondent company has also represented itself as general power of attorney holder of respondent no.2, therefore, all the



- payments by the complainant was made to the respondent company.
8. The complainant submitted that the respondent company claimed that respondent no.2 has obtained license from the Director General, Town & Country Planning, Haryana (DGTCP) for the impugned project land vide license bearing no. 43 of 2010 dated 08.06.2010.
 9. The complainant submitted that the complainant was looking for a good commercial property, therefore, on persuasion of the respondent company, the complainant had shown his willingness to book a unit in the impugned project.
 10. The complainant submitted that based on aforementioned representation and enquiries made, the complainant submitted application for allotment of a unit in the impugned project. The said application form was submitted to the respondent company on 16.04.2012.
 11. The complainant submitted that pursuant to the booking, the respondent company issued allotment letter dated 15.06.2013 for unit no. 21 on ground floor wherein the total consideration for the said unit No. 21 was fixed at Rs.43,36,000/-. The complainant has already paid an amount of Rs.4,96,884/-



dated 07.05.2013 and Rs.4,96,884/- dated 07.05.2013 before the issue of said allotment letter by the respondent company.

12. The complainant submitted that the parties entered into buyer's agreement dated 13.05.2014 for the sale of said unit number no. 21 The total consideration was fixed at Rs. 50,27,050/-.
13. The complainant submitted that as per ABA, the respondent company agreed to sell the unit no. 21, ground floor in the City Scape project with the right to exclusive use of parking space for an amount of Rs.50,27,050/- which includes basic sale price, car parking charges, external development charges and infrastructure development charges, preferential location charges and interest free maintenance security and other charges as per payment plan annexed to the agreement as annexure "II", plus applicable taxes.
14. The complainant submitted that clause 3(a) of said ABA also stipulates a penal interest @ 21% per annum for any delay in payment of instalments made by the complainant to the respondent company.
15. The complainant submitted that as per clause 7 of the ABA, the possession date for the impugned unit no. 21 was agreed to be



36 months from the date of commencement of construction of impugned project. The ABA is nothing but a standard form of agreement wherein the complainant and similarly situated buyers have no option but to sign on dotted line on a pre-set and biased agreement.

16. The complainant submitted that the ABA further stipulates under clause 9 that respondent company, if failed to deliver the possession of the impugned unit to the complainant in accordance with clause 7 of ABA, the respondent shall pay compensation @ Rs.10/- per sq. ft. of the super area per month for the entire period till the date of handing over the possession. The said compensation clause is *ex facie* discriminatory in comparison to clause 3 of the ABA and amounts to unfair trade practices in view of catena of judgments of NCDRC. Further, the said compensation clause is also in direct conflict with the RERA Act, 2016 and rules made there -under. Therefore, the clause 9 of ABA is *non est* in law in view of the fact that it is repugnant to the explicit statutory provision.

17. The complainant submitted that the complainant in pursuant to the agreement for sale made a total payment of



Rs.33,72,709/- by different modes as per the payment plan annexed to the agreement.

18. The complainant submitted that the respondent company failed to deliver the possession in agreed time-frame for reasons best known to them and the respondent company never bothered to intimate reasons and reasoning for the delay to the complainants. Therefore, the respondent company have the breached the sanctity of the agreement for sell i.e. ABA.
19. The complainant submitted that the complainant submitted that after coming in force of RERA Act, 2016 and relevant Rules, the respondent company applied for RERA registration of impugned project vide application dated 31.07.2017 and 08.11.2017 wherein hon'ble authority was pleased to grant the registration vide regd. no. 02 of 2018 dated 01.01.2018.
20. The complainant submitted that the complainant submitted new date of completion of project as 31.12.2018 was granted to the respondent vide aforementioned registration certificate subject to the right of the allottee to withdraw from the project in accordance with Section 18 of the RERA Act, 2016. However, the respondent company has not honoured the handing over of possession till the date as granted by the authority since



they are way beyond the schedule. Therefore, the respondent seems to be a continuous and recurring defaulter in the habit of making false claims to dupe the hard earned money of buyers like the complainant.

21. The complainant submitted that the respondent company is continuous and recurring defaulter and no respite is available against such a recurring either on justifiable or equitable ground. Any further extension to them will amount to travesty of justice as respondent actions seems to be taken in bad faith and with ill motive to misappropriate complainant hard earned money.
22. The complainant submitted that there is more than 2.5 years of unexplained delay in handing over the possession by the respondent company to the complainant without any sign of them meeting the future deadline. Therefore, the complainants have genuine grievance which require the intervention of the hon'ble authority in order to do justice with them.
23. The complainant submitted that the complainant submits that they paid Rs1,54,275/-towards service tax for the impugned project. However, the said service tax was not payable in



accordance with the judgment of Delhi High Court in *Suresh Kumar Bansal. Union of India & Ors.* 2016[43] S.T.R.3(Del.) and which has been followed by Hon'ble Punjab and Haryana High Court in *Balvinder Singh v. Union of India* CWP No. 23404 of 2016, decision dated 25.09.2018. Further, the Complainant is not liable to pay GST which would not have accrued if the Respondents would have handed over the possession in accordance with the ABA, the same has been held by coordinate bench (Panchkula) of Hon'ble Authority in *Madhu Sareen v M/s. BPTP Ltd.* complaint No.113/2018 decision dated 16.07.2018. Therefore, the respondents are under a legal obligation to refund the service tax/GST paid by the complainant.

Reliefs sought:-

- i. Direct the respondent to deliver the possession of unit no.21, ground floor, in the project "The City Scape" situated at sector-66, Gurugram, Haryana along with 21% per annum interest compounded quarterly for the delayed period of handing over the possession calculated from the date of delivery of possession as mentioned in the ABA.

- ii. Direct the respondent company to refund the service tax of Rs.1,54,275/- paid by the complainant.
- iii. To impose heavy penalty upon the Respondent for not abiding by the date of possession as mentioned in RERA registration certificate.

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. 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.

Arguments heard.



25. By virtue of clause 7(a) and 7(b) of the Builder Buyer Agreement executed between the parties on 13.05.2014, possession of the booked unit was to be delivered within a period of 36 months plus 180 days grace period from the date of commencement of construction of the project. Due date of delivery of possession has been calculated from the date of excavation i.e. 12.08.2013. Therefore, the due date of handing over possession comes out to be 12.02.2017. As such the complainant is entitled for delayed possession charges @ 10.20 % p.a. w.e.f. 12.2.2017 till offer of possession as per provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016. 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.

26. The Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The respondent shall not charge anything from the complainant which is not part of the BBA.

27. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest @ 10.20% by the promoter which is the same as is being granted to the complainant in case of delayed possession charges.
28. However, both the parties are at liberty to settle the matter amicably outside the authority.

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 issues the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is directed to pay interest at the prescribed rate of 10.20% per annum on the amount deposited by the complainant with the promoter on the due date of possession (12.02.2017) up to the date of offer of possession.
- ii. The interest so accrued from due date of delivery of possession till the date of order be paid within 90 days

from this order and thereafter, monthly interest be paid at the prescribed rate of 10.20% p.a. by 10th of each subsequent month.

- iii. The Complainant is directed to pay outstanding dues, if any, after adjudgment of interest for the delayed period. The respondent shall not charge anything from the complainant which is not part of the BBA.
- iv. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest @ 10.20% by the promoter which is the same as is being granted to the complainant in case of delayed possession charges.
- v. However, both the parties are at liberty to settle the matter amicably outside the authority.

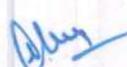
30. The order is pronounced.

31. Case file be consigned to the registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Subhash Chander Kush)

Member

Dated: 03.01.2020