



Complaint No.22 of 2018


Bhawana Maheshwari Nagar versus M/s Varali Properties Ltd.


Present: Shri Vaibhav Suri Advocate for the complainant.

PROCEEDINGS:

Learned counsel for the complainant has moved an application seeking rectification in proceedings dated 7.6.2018 passed by the authority in which the date of execution of agreement was mentioned inadvertently as 26.3.2012 and as per Clause 21 of the said Agreement, the period of possession was mentioned as 36 months + 6 months which expires on 26.9.2015. In the said application, the counsel of the complainant has mentioned that the date of execution of agreement is 21.02.2013 and the period of possession has been mentioned in Clause 21 of the said agreement as 36 months + 1 month which expires on 21.3.2016. After perusing the record, the contention of the counsel for the complainant has been found in proceedings and as such, the application is allowed. The proceedings dated 7.6.2018 are modified to that extent and the rest of the contents of the proceedings shall remain intact. The parties be informed accordingly.

Samir Kumar
(Member)


Dr. K.K. Khandelwal
(Chairman)
12.7.2018


Subhash Chander Kush
(Member)

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

Complaint No.: 22 of 2018
Date of Institution: 28.02.2018
Date of Decision : 12.07.2018

1. Ms. Bhawna Maheshwari Nagar R/o S-79, ...**Complainant**
Greater Kailash-2, New Delhi-110048

Versus

1. M/s Varali Properties Ltd.
Regd. Office Plot no.08, 2nd floor,
Dwarkadeep Commercial Complex, Central
Market, Sector-6, Dwarka New Delhi-
110075 ...**Respondent**

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Satish Sodhani, with Shri Vaibhav Suri Advocates for the complainant
Shri Manmohan Dang and Shri Astish Kumar Advocates for the respondent

ORDER

1. A complaint dated 28.02.2018 was filed under Section 31 of the Real Estate (Regulation & Development) Act, 2016 read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant (Ms. Bhawna Maheshwari Nagar



) against the promoter (M/s Varali Properties Ltd.) on account of violation of Clause 21 of the builder-buyer agreement executed on 21.02.2013 for unit no. D094, 9th floor, block- D in the project "Indiabulls Enigma" for not giving possession on the due date which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid*.

2. The particulars of the complaint are as under: -

1.	Name and location of the project	Indiabulls Enigma, Sector -110, Gurugram
2.	Unit No.	D094, 9th floor, block- D
3.	Registered/Un-registered	Registered
4.	HRERA Registration No.	351 of 2017
5.	Booking amount paid by the buyer to the builder/promoter/company vide agreement	Rs. 5,00,000/-
6.	Total consideration amount as per agreement dated 21.02.2013	Rs.2,53,65,000/-
7.	Total amount paid by the complainant	Rs. 1,03,50,240/-
8.	Percentage of consideration amount	40% Approx.
9.	Date of delivery of possession.	Clause 21 i.e. 21.03.2016. (including grace period of 1 month)
10.	Delay of number of months/ years upto 12.07.2018	2 years 4 months
11.	Penalty Clause as per builder buyer agreement dated 21.02.2013	Clause 22 i.e. Rs.5/- per square ft of super area
12.	Cause of delay in delivery of possession	Due to defaults committed by other allottee(s) in making



		payments of their instalments.
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3. As per the details provided above, which have been checked as per record of the case file. A builder buyer agreement is available on record for Unit No. D094, 9th floor, block- D according to which the possession of the aforesaid unit was to be delivered by 21.03.2016. The promoter has failed to deliver the possession of the said unit to the complainants by the due date nor has paid any compensation i.e. @ Rs. 5 per Sq. ft of the super area of the said unit per month for the period of the such delay as per builder buyer agreement dated 21.02.2013. Therefore, the promoter has not fulfilled his committed liability as on date.
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 12.04.2018. Subsequently, the case came up for hearing on 01.05.2018, 15.05.2018 and 07.06.2018. The reply has been filed on behalf of the respondent which has found to be vague and evasive as it has been contended that the parties are bound by the terms and conditions of the agreement. The respondent has further contended that the delay is possession was due to the default on part of the allottees who failed to make timely payments.



5. During hearings, oral arguments have been advanced by both the parties in order to prove their contentions. As stated by the Counsel for the respondent, they will be able to give possession within next five months and emphasized that they had filed an application for issuance of Occupancy Certificate.
6. As per clause 21 of the builder-buyer agreement, the Company proposed to hand over the possession of the said unit by 21.03.2016. The clause regarding possession of the said unit is reproduced below:

" 21. The developer shall endeavour to complete the construction of the said building/unit within a period of three years, with a one-month grace period thereon from the date of execution of the flat buyers agreement subject to timely payment by the buyer(s) of the total sale price payable according to the payment plan applicable to him or as demanded by the developer. The developer on completion of the construction/development shall issue final call notice to the buyer, who shall within 60 days thereof, remit all dues and take possession of the unit. In the event of his/her failure to take possession of the unit within the stipulated time for any reason whatsoever, he/she shall be liable to bear all taxes, levies, outflows and maintenance charges cost and any other levies on account of the allotted unit along with interest and penalties on the delayed payment, from the dates these are levied/maae applicable irrespective of the fact that the buyer has not taken possession of the unit or has not been enjoying benefit of the same. The buyer in such an eventuality shall also be liable to pay the holding charges @rs.5 per sq.ft. (for the super area) per month to the developer, from the date of expiry of said thirty days till time possession is actually taken over by the buyer ."



Accordingly, the due date of possession was 21.03.2016. As far as the penalty clause in case of delay in possession is concerned which is Rs. 5/sq. ft. of the super area per month, it is held to be one sided as also held in para 181 of the judgment in *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."

7. As the possession of the flat was to be delivered by 21.03.2016 as per the clause referred above, the authority is of the view that the promoter has violated section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, which is reproduced as under:

"11.4 The promoter shall—

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:



Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."

8. The complainant made a submission before the Authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. Section 34(f) is reproduced below:

"34 (f) Function of Authority -

To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder."

It has been requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.



9. As per violation of section 18(1) proviso, the promoter is obligated to pay the complainant, interest at the prescribed rate

for every month of delay till the handing over the possession as the promoter has not fulfilled his obligation. Section 18(1) is reproduced below:

"18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The complainants reserves her right to seek compensation from the promoter for which she shall make separate application to the adjudicating officer, if required.

10. Thus, the Authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue directions to the respondent to give physical possession to the complainant within the time period stated by



the respondent and to pay interest for every month of delay till handing over of the possession at the prescribed rate from the due date of possession as per the terms of the builder buyer agreement and the same shall be payable within 45 days of the date of the order.

11. 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 complainant at a later stage.

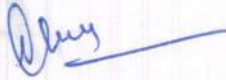
12. The order is pronounced.

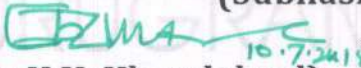
13. Case file be consigned to the registry.



HARERA
GURUGRAM


(Samir Kumar)
Member


(Subhash Chander Kush)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

