

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

Complaint no. : 185 of 2019
First date of hearing : 20.03.2019
Date of decision : 27.02.2020

1. Sh. Subhash Mittal
2. Smt. Rieta Mittal
R/o House no. 1600, Sector-13(P),
Hisar, Haryana

Complainants

Versus

M/s Mapsko Builders Pvt. Ltd.
(through its Managing Director and other
Directors)
Office at: Baani The Address, 6th Floor, No. 1,
Golf Course Road, Sector-56, Gurugram-122011

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Gaurav Bhardwaj Advocate for the complainants
Shri Sanjeev Dhingra Advocate for the respondent
Shri U.P Singh GM (Legal) for the respondent

ORDER

1. The present complaint dated 01.02.2019 has been filed by the complainants/allottees in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is

inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter se them.

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Mapsko Royale Ville", Sector 82, Gurugram
2.	Project area	17.168 acres
3.	Nature of the project	Residential group housing complex
4.	DTCP license no. and validity status	114 of 2008 dated 01.06.2008. It was renewed on 06.06.2012 and valid upto 31.05.2014.
5.	Name of licensee	M/s Shivam Infratech Pvt. Ltd. and M/s Onkareshwar Properties Pvt. Ltd.
6.	HRERA registered/ not registered	Not registered
7.	Unit no.	904, 9 th floor, Tower 'Regal'
8.	Unit measuring	1790 sq. ft.
9.	Date of booking	07.09.2010 (Cheque dated 07.09.2010 paid towards booking, as per applicant ledger dated 18.08.2017, annexure P/6, pg 66 of the complaint)

10.	Date of execution of flat buyer's agreement	15.12.2010 Note: Copy of the agreement duly executed by both parties bears stamp date of 15.12.2010.
11.	Payment plan	Instalment payment plan
12.	Total consideration	Rs. 62,80,150/- (as per buyer's agreement, page 51 of the complaint)
13.	Total amount paid by the complainants	Rs. 69,96,445/- (as per applicant ledger dated 18.08.2017, annexure-P/6, page 71 of the complaint)
14.	Due date of delivery of possession	15.12.2014 Clause 17(a) - 42 months from date of execution of agreement + 6 months grace period, i.e. by 15.12.2014
15.	Status of the project	OC granted on 20.07.2017
16.	Date of offer of possession to the complainants	19.09.2018
17.	Date of handing over of possession	13.01.2019
18.	Delay in handing over possession till date of offer of possession i.e. 19.09.2018	3 years 9 months and 4 days
19.	Specific relief sought	Direct the respondent to pay interest on the amount paid by the complainants for the delayed period.

3. As per clause 17(a) of the flat buyer's agreement dated 15.12.2010, the possession of the subject unit was to be handed over within a period of 42 months from the date of execution of agreement plus grace period of 6 months which

comes out to be 15.12.2014. Clause 17(a) of the flat buyer agreement is reproduced below:

"17. CONSTRUCTION & FORCE MAJEURE CONDITIONS

(a) *That the Promoter shall endeavour to complete the construction of the said Flat within a period of 42 months from the date of signing of this Agreement with the Buyer or within an extended period of six months, subject to force majeure conditions as mentioned in Clause(b) hereunder or subject to any other reasons beyond the control of the Promoter..."*

4. The complainants submitted that Mr. Deshbandhu Dhingra (original allottee) had applied for booking on 07.09.2010 in the said project. The flat buyer's agreement was executed on 15.12.2010. The flat was purchased by the complainants from the original allottee on 05.01.2011 and the unit was transferred in the name of complainants. The respondent failed to hand over possession of the said unit on or before the due date of handing over of possession.
5. It is submitted by the complainants that upon no offer of possession by the due date, i.e. 15.12.2014, they approached the Hon'ble NCDRC, which complaint was later withdrawn in order to file the present complaint. It is further submitted that on 19.09.2018, the respondent sent a mail offering possession to them. The complainants after getting intimation about the offer of possession had approached the respondent and the employee of the respondent named Mr. Sonu Tiwari gave the appointment of 15.10.2018 to take the possession of the said flat. After inspecting the residential



flat, the complainants came to know that the flat was not ready for possession and moreover, the complainants were denied possession on the flimsy and unsubstantial ground that unless and until they withdraw their consumer complaint, they shall not be granted possession by the respondent. Possession was handed over to them on 13.01.2019. Hence, this complaint for the aforementioned reliefs.

6. On the date of hearing, the Authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.
7. The respondent contests the complaint on the following grounds:
 - i. That the project is not covered within the definition of "ongoing project" under rule 2(1)(o) of the Haryana Real Estate (Regulation and Development) Rules, 2017, as the respondent had obtained the occupation certificate on 20.07.2017 which is prior to publication of said rules dated 28.07.2017, and hence the authority has no jurisdiction to entertain the present complaint.
 - ii. That the complainants signed the full and final settlement letter dated 13.01.2019 in which the complainants declared that they will not claim any penalty from the company and, in future, if any statutory charges will be applicable by government that will be



borne by the complainants, so the complaint filed by the complainants is liable to be dismissed on that ground. The complainants also signed the letter of acceptance of possession of the unit in question in which they declared and confirmed that the apartment is complete in all respects and they are satisfied with the specification of the unit and have no claim against the company in respect of terms of work done in the said apartment for the design, specification, building material used for any reason whatsoever.

- iii. That on 19.09.2018, the respondent sent an email offering possession to the complainants. It is denied that after getting intimation about the offer of possession, the complainants had approached to the respondent and the employee of the respondent namely Mr. Sonu Tiwari gave the appointment of 15.10.2018 to take the possession of the said flat.
- iv. That the flat buyer's agreement was executed on 02.03.2012 (and not on 15.12.2010 as alleged by the complainants) between the respondent and Sh. Desh Bandhu Dhingra and the possession of the said flat was to be delivered within 42 months with a further grace period of 6 months from the date of execution of flat buyer agreement i.e. 02.03.2012 which fact was communicated to the complainants vide email dated



12.10.2015. Hence, it is prayed that the complaint be dismissed.

8. Both the parties filed written arguments in order to support their averments. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.
9. The Authority, on the basis of information and other submissions made and the documents filed by the complainants and the respondent, is of considered view that there is no need of further hearing in the complaint.
10. Arguments heard.
11. On consideration of the circumstances, the evidence and other record and submissions made by the complainants and the respondent and based on the findings of the authority regarding contravention as per provisions of rule 28(2)(a), the Authority is satisfied that the respondent is in contravention of the provisions of the Act.
12. The parties argued on the point of date of execution of agreement as the copy of agreement submitted by the complainants with the paper book bears no date apart from the stamp date. The respondent contended that the



agreement was executed on 02.03.2012 with the original allottee/first buyer. Rebutting the contention of the respondent, the complainants have relied upon the order of the authority in ***complaint no. 2261 of 2018 titled as Manisha Sharma and Anr. v/s VSR Infratech Limited (Order dated 25.03.2019)*** wherein in case of non-mentioning of the date of execution of agreement, the stamp date has been considered as the date of execution of the said document. Copy of flat buyer's agreement has been filed as Annexure P4 by the complainants. Revenue stamp bear the date 15.12.2010 though the date of execution of agreement is not mentioned. Annexure A is the copy of flat buyer's agreement filed by the respondent. It also bears the same date on the revenue stamps. However, the respondent is alleging the date of execution of agreement as 02.03.2012. Both the copies in all other aspects are the same. While resolving the dispute with regard to date of execution of agreement, we must not overlook another important point. Admittedly, the original flat buyer's agreement was executed between the respondent and one Sh. Desh Bandhu Dhingra who later on transferred the allotment of the unit in question in favor of the complainants and the respondent



acknowledged the transfer in favor of the complainants. In reply the respondent has stated as follows:

'It is matter of record that complainants have paid a total sum of Rs.69,94,979/- towards the flat from 11.09.2010 to till date as and when demanded by the respondent as per the instalment linked plan.'

13. Had the original flat buyer's agreement been executed between the original allottee and the respondent on 02.03.2012, no occasion would have arisen for the complainants to pay the instalments towards the flat before that date. Secondly, the fact pleaded by the complainants that the transfer of the flat had been made by the original allottee in favor of the complainants on 05.01.2011 has not been refuted by the respondent.
14. Therefore, the authority is of the considered view that the contention of the respondent finds no substance keeping in view the fact that the unit in question was purchased by the complainants herein from the original allottee on 05.01.2011 thereby refuting the probability of execution with first buyer agreement on 02.03.2012.
15. By virtue of clause 17(a) of the flat buyer's agreement executed between the parties on 15.12.2010, possession of the booked unit was to be delivered within a period of 42 months plus 6 months grace period from the date of



execution of said agreement. The grace period of 6 months is allowed to the respondent due to exigencies beyond the control of the respondent. Therefore, the due date of handing over possession comes out to be 15.12.2014. Occupation Certificate has been received by the respondent on 20.07.2017. Copies of the same have been placed on record.

16. As far as contention of the respondent with respect to the date of offer of possession is concerned, a notice of possession dated 21.07.2017 has been placed on record, though, the complainants denied receiving the same and the respondent failed to prove that the same was delivered to the complainants as no receiving regarding hard copy or email has been placed on record by the respondent. Moreover, the respondent has admitted in his reply that it is a matter of record that the unit was offered for possession vide e-mail dated 19.09.2018. Sub-para 'O' of Para 4 of the reply to the facts of the case reads as under:

"That the contents of para no.15 of the brief facts of the case are wrong and denied. It is matter of record that on 19.09.2018, the respondent sent an email offering possession to the complainant. It is denied that after getting intimation about the offer of possession had approached to the respondent and the employee of the respondent namely Sonu Tiwari gave the appointment of 15.10.2018 to take the possession of the said flat. It is further denied that after inspecting the residential the complainants got stunned to see that the flooring work

was not done, few tiles of the bathroom were also broken and swimming pool and club was also not complete. It is denied that the flat was not ready for the possession and moreover, the complainants were denied possession on the flimsy and insubstantial ground that unless and until they withdraw their consumer complaint, they shall not be granted possession by the respondent.'

So, the offer of possession has been considered as 19.09.2018 and the possession has been taken over by the complainants on 13.01.2019.

17. On the contention of the respondent that the project is not covered under the Real Estate (Regulation and Development) Act, 2016 as the Occupation Certificate for the project in question was received on 20.07.2017, i.e. prior to coming into force of the Haryana Real Estate (Regulation and Development) Rules, 2017, the complainants relied upon the orders passed by this Authority in complaints bearing no. **72/2018, 1340/2019, 1786/2018, 1791/2018, 1517/2018, 1780/2018, 2305/2018, 1777/2018, 2371/2018, 758/2018** wherein delayed possession charges were granted in projects where occupation certificate was received prior to coming into force of said rules but later than coming into force of the said Act. The complainants also relied upon judgment passed by Hon'ble Haryana Real Estate Appellate Tribunal in ***Magic Eye Developers Pvt. Ltd. v. Ishwer Singh Dahiya*** and by MahaRERA in ***Avinash Saraf, Neha Duggar***



Saraf v. Runwal Homes Pvt. Ltd. Keeping in view the fact that the Occupation Certificate for the project in question was issued on 20.07.2017, later than coming into force of the said Act on 01.05.2017, the project in question comes within the ambit of the said Act.

18. Copy of 'Full and Final Settlement/ Acceptance of Possession' which according to the respondent is an indemnity cum undertaking given by the complainants at the time of taking possession is annexed as Annexure E and Annexure F respectively with the reply. The only para of the said full and final settlement is relevant and reads as under:

"I have cleared all my dues (full and final) of possession which includes interest and penalty. Further I will not claim any penalty from company and in future, if any statutory charges will be applicable by government will be paid by me."

19. The respondent has not clarified as to why a need arose for the complainants to sign any such full and final settlement letter and as to why the complainants agreed to surrender their legal rights which were available or had accrued in their favour. It is not the case of the respondent that the complainants had executed this document out of their free will and consent. Such an undertaking/ indemnity bond given by a person thereby giving up his valuable rights must be shown to have been executed in a free atmosphere and



should not give rise to a suspicion. If even a slightest of doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. Therefore, this Authority does not place reliance on the said document/ indemnity cum undertaking in view of the fact that the online registration of complaint was made on 12.01.2019, prior to signing of the said document and in view of order dated 03.01.2020 in case titled as *Capital Greens Flat Buyer Association and Ors. V. DLF Universal Ltd., Consumer case no. 351 of 2015*, it was held that the execution of indemnity-cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. The relevant portion is reproduced below:

"Indemnity-cum-undertaking

30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee. Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever.



It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a pre-requisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect which the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Section 23 and 28 of the Indian Contract Act, 1872 and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity."

20. Accordingly, it is the failure of the promoter to fulfil his obligations, responsibilities as per the buyer's agreement dated 15.12.2010 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delayed possession at rate of the prescribed interest @ 10.15% p.a. w.e.f. 15.12.2014 to 19.09.2018 as per provisions of section 18(1) of the Act read with rule 15 of the Rules.
21. Hence, the Authority hereby passes the following order and issue directions under section 34(f) of the Act:



- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.15% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 15.12.2014 till the offer of possession i.e. 19.09.2018 within 90 days from the date of this order.
22. Complaint stands disposed of.
23. File be consigned to registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 27.02.2020


(Subhash Chander Kush)

Member

Judgement uploaded on 03.06.2020