HARYANA REAL ESTATE REGULATORY AUTHORITY, PANCHKULA.

Complaint No. RERA-PKL-COMP. 263/2018

Date of hearing. On 30.07.2018, 2nd Hearing.

Parties names. Jarnail Singh. ...Complainant

Versus

M/s TDI Infrastructure Limited. ...Respondent.

Coram:- Shri Rajan Gupta, Chairman.
Shri Anil Kumar Panwar, Member
Shri Dilbag Singh Sihag, Member.

Present:- Shri Kamal Dahiya, Advocate for Complainant.
Shri Shobit Phutela, Advocate for Respondent.

ORDER:-

1. Complainant Jarnail Singh booked a flat with the respondent in his project named "Tuscan Heights" and was allotted flat number 1101, in area measuring 1080 Sq. fts.in Tower 8.The sale consideration was fixed at Rs. 35,76,573/- and complainant had already paid a total sum of Rs. 18,12,836/-. The buyer's agreement between the parties was executed on 01.10.2011 and deemed date of possession was therein fixed as 01.04.2014. The complainant felt aggrieved when the respondent offered him possession after a delay of 15 months and demanded additional charges on the pretext that the area of flat has been increased by 205.2 Sq. fts.According to the complainant, the increase in area was unilaterally effected without seeking revision of the original plan from

the competent Authority and therefore, he is not liable to pay the additional charges. The complainant's prayer now is for declaring the additional charges as illegal and compensating him for the delay in handing over possession.

2. The respondent has pleaded that actual sale consideration for the flat was Rs. 35,88,581/- out of which complainant has paid Rs. 28,24,844/-. He has sought to wash his hands of the alleged delay in handing over possession by averring that he had already completed the project and had applied for its occupation certificate on 09.05.2014. It was further pleaded that the complainant has defaulted in timely payments of instalments and a sum of Rs.8 Lacs due from him. Such conduct of the complainant has contributed to the delay in handing over possession. Regarding increase effected in the area of flat, the respondent's explanation in three folds namely, (i) the increase has been effected to the extent as permissible by buyers' agreement, (ii) the increase has been made only in accordance with the sanctioned revised plan and (iii) the complainant has not raised any objection at the time when the alleged increase was being effected. In addition to the aforesaid averments, the respondent has also sought to defeat the complainant on the ground that this Authority has no jurisdiction to deal with the complaint because the project is neither registered nor register-able under The Real Estate (Regulation and Development) Act, 2016, for the reason that its occupation certificate was applied prior to enforcement of said Act.

3. The Authority has heard the parties on 30.07.2018 and has reserved its order. After giving thoughtful consideration to the pleading and averments of the parties and on perusal of record, the Authority has decided to make observations and directions hereinafter stated for the disposal of present complaint.

4. At the outset, Authority will deal with the question of jurisdiction raised by the respondent's counsel. Question on this point is no more***res integra*** because this Authority in Complaint Case No. 144 of 2018 titled as "Sanju Jain Versus TDI Infrastructure Ltd." has already ruled that the jurisdiction of Authority to adjudicate the complaint in respect of a project which is neither registered nor register able is not barred. So, the Authority now proceed to dispose of the complaint on merits.

5. Evidently, the complainant is aggrieved of two things namely (i) the increased area and price of the flat and (ii) delay in delivery of possession.

6. As regards point (i), it needs to be first determined as to whether the promoter was entitled to increase the area of the apartment and if so, what increase in the area of the apartment has been actually effected. Clause-6 of the buyer's agreement was relied upon by the respondent for drawing a right in effecting increase. A perusal of the said clause manifest that the promoter was entitled to effect increase in two eventualities: (a) when the company considered

it expedient or necessary to do so; or (b) when the Director Town and Country Planning Department directs or require the promoter to carry out such increase. The respondent has no-where in his written statement explained as to under which of these two categories increase was effected. So, the Authority will direct the respondent to clarify this point to the complainant by sending a detailed reply about the circumstances which actually led to increase of super area.

7. Super area, as defined in Annexure-1 attached to the buyer's agreement, means the sum of apartment area and its pro-rata share of common areas in the entire building. Annexure1, ibid, also defines expressions 'apartment area' and 'common area' as under:-

> **Apartment area** means the entire area enclosed by its periphery walls including area under walls, columns, balconies, cupboards and lofts etc. and half the area of common walls with other premises/independent Floors/Apartments, which form integral part of said apartment.
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> **Common area** means all such parts/areas in the entire said building which the Allottee shall use by sharing with other occupants of the said building including entrance lobby at ground floor, electrical shafts and walls of plumbing shafts on all floors, common corridors and passages, staircase, mumties, services areas including but not limited to, machine

room, overhead water tank, maintenance office/stores etc., architectural features, if provided and security fire control rooms.

So, the increase in the super area can occasion either by increase of apartment area or by increase in the common area or by increase in both common area as well as covered area. The respondent has maintained a complete silence in his reply with regard to the details of different components which has resulted in increase of either the apartment area or common area or both. So, the Authority will further direct that the respondent shall send a detailed statement to the complainant furnishing following informations:-

(i) Various Components which were constituting original purchased super area measuring 1080 Sq. feet as per the plans already prepared/got approved before execution of buyer's agreement;

(ii) Various components which after alleged increase are constituting the present super area of the apartment as per revised sanctioned plan.

8. The respondent besides supplying of above referred information shall also provide an opportunity to the complainant to inspect the original building plan and revised building plan approved by the competent authority for verifying whether the addition in super area of apartment, as shown in the statement so supplied to him have been actually carried out over and above the original super area measuring 1080 Sq. feet of the apartment. The respondent

will thereafter be entitled to recover additional price for increase in super area from the complainant in terms of Clause-7 of the buyer's Agreement which provides that increase to the extent of 10% shall be made as per basic rate i.e. Rs. 21,259/- per sq. mtr. and the promoter shall have a discretion to fix the rate for the increased area beyond 10%. The Authority will observe that the respondent shall exercise discretion in fixing such rate in a reasonable and justifiable manner and the complainant, if feels aggrieved by the fixation of such rate, will be at liberty to approach this Authority by filing a fresh complaint, for redressal of his grievance.

9. Now coming to the point concerning delay in delivery of possession. The deemed date of possession fixed in the buyer's agreement was 30 months from the date of execution of buyer's agreement and the date thus works out as 01.04.2014. The respondent's plea is that he had offered fit out possession to the complainant after completing 90% of the project. It was nowhere mentioned in his reply that the possession was offered after obtaining occupation certificate from the concerned department. So, the offer made without obtaining completion certificate has not sanctity in the eyes of law. The respondent could not dare to mention anywhere in his reply that he had already received the occupation certificate and therefore, it has to be necessary held that he is still not in a position to legally hand over the possession. So, the respondent is liable to compensate the complainant for delay occurring in the delivery of the possession.

10. Perusal of buyers' agreement would reveal that the complainant was liable to pay interest at the rate of 21% under clause 11 to the respondent for default committed in respect of payment of any instalment and such rate of interest was to increase to 24% if such delay exceeds 90 days. The respondent on the other hand was liable to compensate the complainant under clause 30 of the buyers' agreement by paying Rs. 5/- per Sq. ft. of the total super area of the apartment for every month of delay. Such disparity in default clauses is unsustainable under Section 2 (za) of the Real Estate (Regulation and Development) Act, 2016, (RERA Act) which mandatorily provides that default penalty for promoter and the buyer must be equal. Explanation (b) attached to the specimen format of Agreement for Sale prescribed in Annexure A of The Haryana Real Estate (Regulation and Development) Rules, 2017 [in short HRERA, Rules] eloquently provides that such clause of buyers' agreement which are contrary to the provisions of RERA, Act would be void ab-initio. So, clauses 11 and 30 of the buyer's agreement entered between the present complainant and the respondent are unenforceable and the complainant deserves to be compensated for the delay period starting from deemed date of possession i.e. 01.04.2014 till the date on which the respondent will offer possession after obtaining occupation certificate, at the rate envisaged in Rule 15 of the HRERA, Rules i.e. @ of SBI highest marginal cost of land rate plus 2%.

11. The complainant is accordingly disposed of with the direction that the respondent shall offer possession to the complainant strictly in terms of the direction contained in this order.

12. Nothing stated in this order shall be deemed as precluding the complainant from claiming other compensations as he may be entitled under the RERA, Act, 2016 by approaching the competent Authority. File be consigned to record room.

Dilbag Singh Sihag
Member

Anil Kumar Panwar
Member

Rajan Gupta
Chairman.

I fully agree with the orders passed by learned friends except with the part relating to payment of compensation to the complainants on account of delay caused by the respondents in handing over the possession of the apartment. I would observe as follows:-

(i) Rule 15 of the HRERA Rules which my learned friends have applied to the facts of the case essentially deals with the situations when the project has not been executed and refund of the amount deposited has been allowed. Admittedly, in this case the project has been executed and occupation certificate has been applied to the relevant Authorities. Accordingly, there is no denial to the fact that the money paid by the complainants have been invested on the project itself by the respondents. However, delay has occurred in execution of the project.

(ii) For the delay caused in execution of the project and handing over the possession the complainants deserves to be compensated. I have laid down detailed principles for determining the compensations in such matters in Complaint Case No.49 of 2018- Parkash Chand Arohi versus Pivotal Infrastructures Pvt. Ltd. The reasons and logic cited in that judgment shall be fully applicable to the facts and circumstances of this case as well.

(iii) I, observe that deemed date of possession comes to 01.04.2014 thus delay of nearly 4-5 years has been caused which is highly inordinate. In real estate projects delay of some period is always possible, therefore, I have ordered in several cases that for the reasonable period of delay, compensation at the rate provided for in the agreement shall be payable. However, for unreasonable period of delay compensation in the form of interest of reasonable rates shall be payable.

(iv) Applying above principles to the facts of this case, I order that for the first two years of delay the compensation payable shall be as provided for in the agreement i.e. Rs. 5/- per sq.ft. of the super area. For the period beyond the initial years the respondents shall pay to the complainants interest on the entire amount deposited by the complainant at the rate 9%. The complainant, will also, retain his right to approach the Adjudicating Officer for seeking compensation on account of the special damage or harassment that he may have suffered.

I order accordingly.

(Rajan Gupta)
Chairman