

**BEFORE HARYANA REAL ESTATE REGULATORY AUTHORITY,
PANCHKULA.**

Date of Hearing: 20.11.2018

Complaint No.592 of 2018

Arun Prabha

... Complainant

VERSUS

M/s Omaxe Pvt. Ltd.

... Respondent

CORAM :

1. Shri Rajan Gupta, Chairman
2. Shri Anil Kumar Panwar, Member
3. Shri Dilbag Singh Sihag, Member

APPEARANCE :

1. Shri R.P. Arora Advocate for the complainant
2. Shri Subhash Chandra, Authorised representatives of Complainant.
3. Shri Sanjeev Sharma, Advocate for the Respondent.

Order:

This complaint was received by the Authority on 05.10.2018 whereafter a notice dated 09.10.2018 was issued to the respondent for filing his reply by 31.10.2018. The reply, however, was filed by the respondent on 06.11.2018. For the delayed filing of reply a cost of Rs.14,000/- was imposed on the respondent. Learned counsel for the respondent has filed an application for condonation of delay and waiver the of cost. After consideration the application was rejected because the



respondent had received the notice for filing their reply within the prescribed time schedule.

2. The case of the complainant is that he booked a Unit No.705 measuring 1164 sq.ft. in the project 'Omaxe Heights', Sonipat promoted by the respondent. Builder-buyer agreement was executed on 07.04.2010 which inter alia stipulated that the possession will be offered within 36 months. Accordingly, the deemed date of delivery was 07.04.2013. According to the complainant full consideration of Rs.17,19,240/- of the apartment was paid on the date of execution of the agreement. However, additional amount of about Rs.4.00 lakhs has also been paid between the years 2010 and 2013.

Further grouse of the complainant is that the respondent offered him possession of the apartment on 12.06.2013 when he had not obtained an occupation certificate in respect of the building nor the building was actually complete and ready for occupation. Further, even upto April, 2014 correspondence was made with the respondent for rectifying the defects in the building and for actual handing over of the possession after the rectifications. In April, 2014 the respondent had replied back to the complainant that the apartment was ready for handing over of possession and the complainant should contact Mr. Ajit at the site for this purpose. The complainant states that the actual physical possession was given to them in November, 2014 and even at that stage neither the occupation



certificate had been obtained nor the apartment was complete in all respects. The complainant had to spend an amount of Rs.1.00 lakh for rectification of the defects.

The complainant seeks compensation for delay, return of expenditure of Rs.1.00 lakh incurred by him for rectification of the defects, and compensation for mental harassment etc.

3. The case of the respondent is that this Authority does not have jurisdiction to deal with this complaint because it is based on an agreement made much prior to coming into force of RERA. Further, some of the reliefs prayed for falls within the jurisdiction of the Adjudicating Officer, therefore, the Authority should not entertain this complaint.

The other defence taken by the respondent is that it is a well settled principle of law that in the cases of sale of immovable property time is never regarded as the essence of the contract, more so, when there is penalty clause under the agreement for alleged delay. The respondent company was to try and 'endeavour' to provide compensation to the complainant within 36 months. Respondent states that the term endeavour does not give any definitive commitment to handover the possession within the indicated time period. Accordingly, the complainant is not entitled to claim possession and compensation in time bound manner because otherwise it would amount to specific performance of the



contract. In support of their contention learned counsel cited the judgement of Hon'ble Supreme Court in case Smt. Chand Rani (Dead) by LRs Vs. Smt. Kamal Rani (Dead) LRs. AIR 1993 SC 1742.

The respondent further pleads that buyers- agreement anticipates delays due to force majeure conditions. Further, for the delay there is a specific provision in the agreement for compensating the complainants @ Rs.5/- per sq.ft. of super area per month for such period of delay. The respondent claims to have credited an amount of Rs.12,820/- into account of the complainant on this account.

4. During the course of the hearing learned counsel for the respondent referred to Annexure R/7 which is an affidavit-cum-undertaking dated 06.08.2013 signed by the complainant to the effect that the complainant accepts the offer of the company to take temporary possession of the unit to carry out fit out the furnishing works. It further states that the deponent/complainant has agreed all the fittings and fixtures have been installed to his full satisfaction and in case any damage is caused to the unit by the complainants the same shall be restored by the complainant/deponent at his own cost and shall not ask the company to repair the same.

Learned counsel for the respondent states that by virtue of the above stated affidavit-cum-undertaking the complainant is debarred from



pleading that the possession has been offered to him with delay or the apartment was incomplete in any manner.

5. The written and oral submissions by both the parties have been examined in detailed. It is observed and ordered as follows:-

- (i) The fact of the payments having been made by the complainant as stated in the complaint have not been denied. The fact of builder-buyer agreement dated 07.04.2010 has also not been denied. As per the provisions of the agreement and the written statement of the respondent, possession was to be delivered within 36 months. Accordingly, the possession was supposed to be delivered by April, 2013.
- (ii) The complainant alleges that the actual possession has been delivered in November, 2014. The respondent relies upon on affidavit-cum-undertaking of August, 2013 to state that the possession was delivered at that time. However, perusal of the e-mail dated 4th April, 2014 sent by the respondent to the complainant proves beyond doubt that even by April, 2014 the actual physical possession had not been handed over. The respondent vide the said e-mail had replied that "We had discussed the case with the concerned departments and would like to inform you that your possession is ready and you may collect keys of your flat on any working day from



Mr. Ajit at the site. This e-mail of the respondent falsifies their claim that the possession had been handed over to the complainant in August, 2013.

The complainant has alleged that finally the physical possession was actually delivered to them in November, 2014. Even though no proof has been produced, in support of this assertion but this fact has also not been specifically denied by the respondent. The claim of the respondent of having handed over the possession in August, 2013 has surely been proved to be incorrect. In the circumstances of the case, the Authority presumes correctness of the claim of the complainant that the actual physical possession was given to him in November, 2014 i.e a delay of one year and sever months.

- (iii) The respondent has also challenged the jurisdiction of the Authority. This objection is overruled in terms of the orders of this Authority passed in Complaint Case No.144of 2018- Sanju Jain Vs. TDI Infrastructure Pvt. Ltd. The logic and reasoning given therein shall be applicable here to settle the challenge relating to the jurisdiction of the Authority.
- (iv) The respondent has also pleaded that time is not essence in such contracts and the complainant could not have asked for



time bound possession of the apartment because that will amount to specific performance of the contract. In support of his arguments he has cited the judgement of the Hon'ble Supreme Court AIR 1993 SC 1742. The respondent further states that for the delay period there is a provision in the agreement to compensate @ Rs.5/- per sq.ft. per month to which account they have already paid an amount of Rs.12,820/-

On the issue of delayed handing over of the possession there are specific provisions in the RERA Act, 2016. In the event of delay Section 18 guarantees certain rights to the complainants for either seeking refund or for seeking possession along with compensation for delay in handing over the possession. In the face of specific provisions of law having been enacted by the Parliamentary of India, this Authority has no other option but to follow the provisions of the law in letter and spirit. When there are specific provisions in a statute to deal with a situation the quoted judgement of Hon'ble Supreme Court shall not be applicable to such circumstances as are specifically covered by the statute.

(v) Regarding the compensation for delay this Authority has evolved certain principles in Complaint Case No. 113 of 2018- Madhu Sareen Vs. M/s BPTP Ltd. and Complaint case No.49 of 2018- Parkash Chand Arohi Vs. Pivotal Infrastructure Ltd. This Authority has delivered a split judgement in these case. While the undersigned is of the view that in the case of a reasonable delay i.e. upto 2 years, the compensation should be paid in accordance with the provisions of the agreement @ Rs.5/- per q.ft. of the super area per month. This is for the reason that the real estate projects do get delayed for variety of reasons and a person who books an apartment are under development project does reasonably foresee such delays and is deemed to have consciously agreed to be compensated @ provided for in the agreement. However, the learned majority Members are of the view that the compensation should be paid even for such delays @ provided for in rule 15 of the RERA Rules. The learned Members have given retrospective application to this Rule which had not been agreed to by me. However, by virtue the provisions of law, the views of the majority Members shall be applicable. Accordingly, the principle evolved by majority Members for compensation for delayed




handing over of possession will remain applicable. Accordingly, action case shall be taken in accordance with the views of the majority Members expressed the Complaint Case No.113- M/s Madhu Sareen Vs. BPTP Ltd.

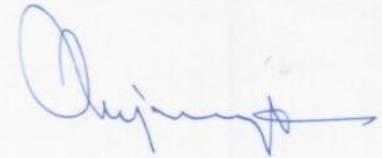
(vi) No specific proof other than oral submissions has been submitted by the complainant for having incurred a cost of Rs. 1.00 lakh on repair of the apartment. In the absence of a specific proof thereof this claim cannot be admitted at this stage.

6. Admittedly the actual occupation certificate in respect of the building was received on 26.10.2015; the deemed date for handing over the possession was 07.04.2013; the actual physical possession was handed over in November, 2014. Since the complainant had actually taken over the possession in November, 2014, they will be entitled for compensation for delay in getting the possession from April, 2013 to November, 2014 i.e. for a period of one year and 7 months. For this period they will get compensation in accordance with the principles discussed in the foregoing paragraphs.

Disposed of in above terms


Dilbag Singh Sihag
Member


Anil Kumar Panwar
Member


Rajan Gupta
Chairman

Sh. A.K. Panwar, Hon'ble Member vide his email dated 07.01.2019, has approved and consented to the above orders.

Dated:07.01.2019




Executive Director
HRERA, Panchkula