

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

Complaint no. : 813 of 2021
First date of hearing: 22.04.2021
Date of decision : 09.07.2021

Anuradha Yadav
D/o: - Sh. Raj Singh Yadav
R/o: - RZ-43, Prem Nagar, Phase- 1,
Near BVM School, Near Police Station,
Najafgarh, New Delhi- 110043

Complainant

Versus

1. M/s Tashee Land Developers.
2. M/s KNS Infracon Private Limited
Both having Regd. office at: Pent House, 18th
Floor, Narain Manzil, 23 Barakhamba Road,
Cannaught Place, New Delhi- 110001

Respondents

CORAM:

Shri K.K. Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

Chairman
Member
Member

APPEARANCE:

Sh. Manmohan Yadav
None

Advocate for the complainant
Advocate for the respondents

EX-PARTEORDER

1. The present complaint dated 09.02.2021 has been filed by the complainant/allottee 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 aliap*rescribed that the promoter shall be responsible for all obligations, responsibilities and functions as provided under the provision of the Act or the Rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

2. Since, the buyer's agreement has been executed on 15.02.2014 i.e. prior to the commencement of the act *ibid*, 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 statutory obligation on part of the promoter/respondent in terms of section 34(f) of the act *ibid*.
3. The particulars of unit details, sale consideration, the amount paid by the complainant, 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	"Capital Gateway", Sector- 111, Gurugram.
2.	Project area	10.462 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	34 of 2011 dated 16.04.2011

		valid till 15.04.2024
5.	Name of licensee	KNS Infracon Pvt Ltd& 3 others
6.	RERA Registered/ not registered	Registered vide no. 12 of 2018 dated 10.01.2018
7.	RERA registration valid up to	31.12.2020 for phase-I (tower A to G) and 31.12.2021 for phase-II (tower H to J)
8.	Unit no.	101, 1 st floor, tower F [Page no. 22 of complaint]
9.	Unit measuring	1695 sq. ft. [Page no. 43 of the complaint]
10.	Date of allotment letter	19.05.2014 [page no. 15 of complaint]
11.	Date of execution of flat buyer agreement in favour of first allottee	15.02.2014 [page no. 20 of complaint]
12.	Date of execution of transfer endorsement	19.01.2014 [page no. 55 of complaint]
13.	Payment plan	Construction linked payment plan [Page no.53 of complaint]
14.	Total consideration	Rs.70,78,730/- [As alleged by the complainant in payments details page no.13 of the complaint and payment schedule page no. 64 of complaint]
15.	Total amount paid by the complainant	Rs.65,51,751/- [As per payment schedule page no.64 of the complaint]
16.	Due date of delivery of possession as per clause 2.1 of the flat buyer agreement 36 months from the date of sanction of building plan& a grace period of 180 days, after the expiry of 36 month, for applying and obtaining the	07.06.2015 As per information obtained by planning branch building plan approved i.e. 07.06.2012. [Note- Grace period not allowed]



	occupation certificate [Page 28 of complaint]	
17.	Delay in handing over possession till the date of order i.e. 09.07.2021	6 years 1 month and 2 days
18.	Status of the project	On going

B. Facts of the complaint

4. The complainant submitted that he had booked a unit in the respondent project i.e. Capital gateway on 29.01.2011 with an amount of Rs.5,00,000/- in "Construction Linked Plan" and the unit no. F-101 was allotted to him by the respondent and made a payment of Rs. 23,34,742/- made the payment till the raise of construction.
5. That in the month of April 2014, M/s Paras Properties approached the complainant for the resale of their flat in M/s Tashee Land Developers Pvt. Ltd. & M/s KNS Infracon Private limited. Its in their project "Capital Gateway" at Dwarka Expressway, Sector-111, Gurugram, Haryana which was booked by M/s Paras Properties vide unit no. F-101 having super area 1695 sq. ft area. Thereafter, complainant visited at the office and agreed for purchasing the said flat with basic sale price of unit is 3325 per sq. ft. it is also informed that the respondents company has already approved building plan on 07.06.2012.



6. That on 08.05.2014, complainant made a payment of Rs. 23,34,742/- in the account of previous owner and who executed all the necessary documents on 09.05.2014 in the name of complainant and on 09.05.2014, so that the respondents transfer the unit no. F-101 in the name of complainant. That the complainant also issued to two security cheques i.e. 109105 & 109106 Axis Bank, Najafgarh Branch, New Delhi in favor of the respondent. Thereafter, the respondent issued an endorsement letter dated 15.05.2014 regarding transfer of rights and interest for housing unit no. F-101, Tower- F admeasuring 1695 sq. ft. in the name of the complainant. The respondent company issued an allotment letter dated 19.05.2014 in favour of complainant.
7. That as per clause no. 2.1 of the agreement, the respondent had to hand over the possession of the flat "within approximate period of 36 months from the date of sanction of the building plans of the said colony and building plans of colony was sanctioned on 07.06.2012, therefore due date of possession 07.12.2015. The respondents company assured by the complainant that the possession of the said flat was delivered in the month of December, 2015.
8. The complainant submitted that he had applied for the loan as per the convenient to the respondent and the loan of Rs.38,00,000/- was granted to the complainant. That the

bank disbursed the amount of Rs.38,00,000/- in three installments to the respondent i.e. on 31.10.2014 amounting Rs.25,44,248/-, 31.03.2015 amounting Rs.8,00,827/- and 17.09.2015 amounting Rs. 4,54,925/-.

9. That the complainant approached the respondents since after the December, 2015 but whenever the complainant asked about the delivery of possession, the respondents made the excuses that they will deliver the possession with in 6 month on every point of time.
10. The complainant further submitted that in the month of April, 2017, complainant received a letter that the respondents were planning to increase the super area & again in the month of May, 2017, complainant again received a letter that the super area has been increase from 1695 Sq. ft to 1874 sq. ft.
11. That in month of May, 2017, complainant visited at the project site "Capital Gateway" Sector-111, Gurugram, where she astonished that the construction was still going on in a very slow manner. That the complainant immediately contacted to the respondents and asked to pay the penalty for delaying in possession but the respondents she assured that they need some more time of 6 month to finish the construction and after that within 2 month possession will delivered and she no need to worry but the complainant has



left no option to wait for completion of construction work and this will continue till October, 2018. That in the month of November, 2018 construction work was completed.

12. That during the period of December, 2018 to June, 2020, respondents made several excuses on one pretext to other. That on 06.06.2020, complainant visited at the project site, where complainant shocked to see that only temporary plaster was done and nothing has been done. In-return, complainant sent some photographs of sample unit to the complainant to make the balanced payment. That when the complainant asked the same, respondents again made excuse of Lock-down and assured that they will complete as soon as possible.

13. That the complainant bank has paid an amount of Rs.38,00,000/- and in addition to the same Rs.4,20,000/- was paid by the complainant and the copy of the receipts are annexed herewith and Rs.65,54,742/- was paid by the complainant out of Rs.72,28,730/-. Thereafter, the complainant had communication by the representative of the respondents Mr. Manish Kumar Manager posted at the project site "Capital Gateway" informed that the structure construction was started in the year 2014 and completed in the end of the year, 2018.

C. Relief sought by the complainant

14. The complainant has sought following relief(s):

(i) Direct the respondent to pay the interest at the prescribed rate for every month of delay from due date of possession 07.12.2015 till the actual handing over the possession.

(ii) Direct the respondent not to charge any amount as no super area has been extended.

15. The authority issued a notice dated 10.04.2021 of the complaint to the respondents by speed post and also on the given email address at info@tashee.in. The delivery reports have been placed in the file. Thereafter, a reminder notice dated 28.06.2021 for filing reply was sent to the respondents on email address at info@tashee.in. Despite service of notice, the respondents have preferred neither to put in appearance nor file reply to the complaint within the stipulated period. Accordingly, the authority is left with no other option but to decide the complaint ex-parte against the respondents.

16. 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 based on these undisputed documents and submission made by the complainant.

E. Jurisdiction of the authority

17. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in *Simmi Sikka v/s M/s EMAAR MGF Land Ltd. (complaint no. 7 of 2018)* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020, in appeal nos. 52 & 64 of 2018 titled as *Emaar MGF Land Ltd. V. Simmi Sikka and anr.* सत्यमेव जयते

G. Findings on the relief sought by the complainant

Relief sought by the complainant: Direct the respondents to hand over the possession along with prescribed interest per annum from the promissory date of delivery of the flat in question till actual delivery of the flat.

18. In the present complaint, the complainant intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

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

.....

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.”

19. Clause (2.1) of the flat buyer agreement (in short, agreement)

provides for handing over of possession and is reproduced below: -

2. POSSESSION OF UNIT: -

2.1. Subject to Clause 9 herein or any other circumstances not anticipated and beyond control of the first party/confirming party and any restraints/restrictions from any courts/authorities and subject to the purchaser having complied with all the terms and conditions of this agreement and not being in default under any of the provisions of this agreement including but not limited timely payment of total sale consideration and stamp duty and other charges and having complied with all provisions. Formalities, document., as prescribed by the first party/confirming party, whether under this agreement or otherwise, from time to time, the first party/confirming party proposes to hand over the possession of the flat to the purchaser within approximate period of 36 months from the date of sanction of the building plan of the said colony. The purchaser agrees and understands that the first Party/confirming party shall be entitled to a grace period of 180 (one hundred and eighty) days, after the expiry of 36 months, for applying and obtaining the occupation certificate in respect of the colony from the concerned authority. The first party/confirming party shall give notice of possession, and in the event the purchaser fails to accept and take the possession of the said flat within 30 days of, the purchaser shall be deemed to be custodian of the said flat from the date indicated in the notice of possession and the said flat shall remain at the risk and cost of the purchasers.

20. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting



of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoters are just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

21. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the apartment within a period of 36 months from date of sanction of building plans and further provided in agreement that promoters shall be entitled to a grace period of 180 days for applying and obtaining occupation certificate in respect of group housing complex. As a matter of fact, the promoters have not applied for occupation certificate within the time limit prescribed in the flat buyer agreement. As per the

settled law, one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter at this stage. The same view has been upheld by the hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as ***Emaar MGF Land Ltd. VS Simmi Sikka*** case and observed as under: -

68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.

22. **Payment of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

23. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka (Supra)** observed as under: -

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the home buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's

Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

24. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 09.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

25. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation. —For the purpose of this clause—

- (i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
- (ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

26. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e.,



9.30% by the respondents/promoters which is the same as is being granted to the complainant in case of delayed possession charges.

27. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 2.1 of the agreement executed between the parties on 15.02.2014, the possession of the subject apartment was to be delivered within 36 months from the date of sanction of building plans i.e. 07.06.2012. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 07.06.2015. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents/promoters to fulfil their obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondents is established. As such, the allottee shall be paid, by the promoters, interest for every month of delay from due date of

possession i.e., 07.06.2015 till the handing over of the possession, at prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

28. The allottee requested for fresh statement of account of the unit based on the above determinations of the authority.

H. Directions of the authority

29. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 07.06.2015 till the date of handing over of possession.
- ii. The promoters shall credit delayed possession charges in the statement of accounts or applicant ledger of the unit of the allottee, if the amount outstanding against the allottee is more than the DPC, this will be treated as sufficient compliance of this order.
- iii. If there is no amount outstanding against the allottee or less amount outstanding against the allottee then the balance delay possession charges shall be paid after adjustment of the outstanding against the allottee.

- iv. The arrears of such interest accrued from 07.06.2015 till the date of order by the authority shall be paid by the promoters to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoters to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- v. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- vi. The rate of interest chargeable from the allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- vii. The respondents shall not charge anything from the complainant which is not the part of the agreement. However holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by hon'ble Supreme Court in civil appeal no. 3864-3899/2020.


viii. The promoters are directed to furnish to the allottee statement of account within one month of issue of this order. If there is any objection by the allottee on statement of account, the same be filed with promoters after fifteen days thereafter. In case the grievance of the allottee relating to statement of account is not settled by the promoter within 15 days thereafter, then the allottee may approach the authority by filing separate application.

30. Complaint stands disposed of.

31. File be consigned to registry. जयते


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 09.07.2021

Judgement uploaded on 12.08.2021