

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

Complaint no. : 573 of 2021
First date of hearing: 22.04.2021
Date of decision : 09.07.2021

Atika Chawla
R/o: - 1/10 Jaidev Park,
Rohtak Road, East Punjabi Bagh,
New Delhi

Complainant

Versus

1. M/s Tashee Land Developers.
2. M/s KNS Infracon Private Limited
Both having Regd. office at: 517, A
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. Aditya Bhardwaj
None

Advocate for the complainant
Advocate for the respondents

EX-PARTE ORDER

1. The present complaint dated 29.01.2021 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 alia*



prescribed 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 15.12.2014 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.	401, 4 th floor, tower H [Page no.43 of complaint]
9.	Unit measuring	2675 sq. ft. [Page No. 43 of the complaint]
10.	Date of execution of Flat buyer agreement	15.12.2014 [page no. 41 of complaint]
11.	Payment plan	Construction linked payment plan [Page no. 76 of complaint]
12.	Total consideration	Rs.1,10,28,700/- [As alleged by the complainant in payments details page no.13 of the complaint]
13.	Total amount paid by the complainant	Rs.1,14,79,246 /- [As per statement of accounts dated 01.04.2020 page no.85 of the complaint]
14.	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 occupation certificate [Page 50 of complaint]	07.06.2015 As per information obtained by planning branch building plan approved i.e. 07.06.2012. [Note- Grace period not allowed]
15.	Delay in handing over possession till the date of order i.e. 09.07.2021	6 years 1 month and 2 days
16.	Status of the project	On going



B. Facts of the complaint

4. The complainant submitted that he had a respectable citizen of India and running her own business. That in the month of March 2012, the respondents launched a group housing project under the name and style of "Capital Gateway" located in Sector 111, Gurugram, Haryana bearing license no 34 of 2011 issued by DTCP Haryana. It was stated by the agents and brokers of respondents that the project has strategic location as the sector in which its located is adjacent to Delhi Border, Diplomatic enclave, and Airport. The project will be connected with all modes of transport and is located on one of the most strategic roads that is Dawarka Expressway which is connected to National Highway Delhi - Jaipur.
5. That with regard to booking it was stated by the agent of the respondents that the since the project is sold out however one of the customer namely Neeta Singh was looking for exit from the project. The respondents will do necessary documentation and will transfer the booking of erstwhile owner in favour of the complainant on request of the erstwhile owner. Pursuant to same the complainant made payment to the erstwhile owner of Rs.5,00,000/- vide cheque dated 14.04.2012 and along with same another cheque of Rs.18,09,538/- was given to the respondent in name of Tashee Land Developers Pvt Ltd. That along with the said



payment the complainant also paid an amount of Rs.1,04,250/- by way of cash for the delayed interest @18%.

6. That based on the assurance of timely delivery and premium quality the complainant booked/purchase a flat admeasuring 2675 sq. ft. in the project called 'Capital Gateway' for a sale consideration of Rs.1,10,28,700/- That the unit allotted to complainant was bearing number H-401 in tower H. Thereafter, making payment of Rs.24,13,788/- the complainant kept asking for the execution for the builder buyer agreement however the same was denied on one pretext or another.
7. The complainant submitted that in March 2013, he had received a demand of Rs.18,04,911/- from the respondents. In the said letter it was stated that the complainant has paid Rs. 24,13,788/- which included penal interest and further an amount of Rs.18,04,911/- is due to be paid towards pending installment which also included penal interest 18%. That he had receiving letter approached the respondents and informed that there has been no development in the project hence in light of same the demand is not proper. That on being approached the respondent stated that in case the complainant does not make payment the booking will be cancelled and whole amount paid till date will be forfeited.



8. The complainant further submitted that they had left with no other option the complainant made further payment of Rs.12,94,876/- toward the sale consideration and Rs. 1,04,250/- towards the interest. After the payment of the above amount the respondents issued a summary detail dated 22.11.2013 where in an amount of Rs.38,12,916/- was admitted being received by the respondents from the complainant. That the said amount was further confirmed by the respondents by way of ledger dated 01.04.2014.
9. The respondents sent a draft of buyer's agreement dated 14.12.2014 to complainant. On receiving the same the complainant expressed its reservations along with few other applicants regarding few clauses of the agreement and sought meeting regarding the same. However since the respondents were hell-bent not to change the agreement the complainant signed the same the copy of which was received back in April 2015.
10. That as per clause 2.1 of the of the builder buyer agreement the project was proposed to hand over within the period of 36 months from the date of sanction of the building plans and other necessary Government approvals thereon, of the said Colony. That it's the admitted case of the respondent that excavation of the project was started in way back July 2012, hence the project was to be delivered latest by July 2015 and



even with extended period *IF APPLICABLE* the time for completion of projects ends in January 2016.

11. That in year 2017 on demand of the respondents the complainant made payment of (i) Rs.10,00,000/- on 29.06.2017, (ii) Rs.10,00,000/- on 04.07.2015, (iii) Rs.5,52,201/- on 13.07.2017 to respondents. That against same the respondents recently issues ledger dated 01.04.2020 wherein it has been stated that an amount of Rs.1,14,79,246/- has been paid by the complainants towards the consideration of Rs.1,10,28,700 till July 2017.
12. That since 2017 there has been no development in the project. However recently the respondents made a committee of few allottee which has been handpicked by the respondent to supervise the construction and collect money knowing well the same is illegal and undemocratic and pending for adjudication before court of law.
13. That the present project at the date of filing of the present complaint is construction phase only civil structure is barely ready the actions of the respondents have been clearly in violation of the act and rules made there under as the respondents after having all the permissions way back in 2011 has failed to deliver the project within the time given in the agreement. In light of same the complainant requests the



authority to levy penalty in form of interest at the rate of 24% for the period of delay.

C. Relief sought by the complainant

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

(i) Direct the respondents to handover the possession along with delayed possession charges @24% p.a.

15. The authority issued a notice dated 01.04.2021 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.*

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 promoter 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 promoters 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 15.12.2014, 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 promoters 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 promoters 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.


(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