



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

Complaint no. : 4774 of 2020
First date of hearing : 10.03.2021
Date of decision : 09.07.2021

1. Harish Kukreja
2. Mandeep Kaur Kukreja
Both RR/o: - H No.128-B,
Siddharth Extn.,Pocket-C,
Jangpura, South Delhi- 110014

Complainants

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,
Connaught Place, New Delhi- 110001

Respondents

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Sh. Varun Chugh
Sh. None

Advocate for the complainants
Advocate for the respondents

EX-PARTE ORDER

1. The present complaint dated 13.01.2021 has been filed by the complainants/allottees 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 08.01.2014 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 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	"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.	103, 1 st floor, tower B [Page no. 23 of complaint]
9.	Unit measuring	1990 sq. ft. [Page No. 23 of the complaint]
10.	Date of execution of flat buyer agreement	08.01.2014 [page no. 21 of complaint]
11.	Payment plan	Construction linked payment plan [Page no. 56 of complaint]
12.	Total consideration	Rs.86,90,354/- [As alleged by complainant page no. 4 of the complaint]
13.	Total amount paid by the complainants	Rs. 78,17,979/- [As per demand note page no. 56 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 29 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 2days
16.	Status of the project	On going

B. Facts of the complaint



4. The complainants submitted that, the property in question i.e. apartment bearing no. 103, 1st floor, Tower-B, admeasuring 1990 sq.ft., along-with car parking space in the project known as "Tashee Capital Gateway" situated as Sector-111, Gurugram, Haryana was booked by them, in the year 2010.
5. Thereafter, on 08.01.2014, i.e. after a considerable delay of more than 3 years, the respondent entered into builder buyer's agreement with the complainants by virtue of which the respondent allotted the apartment bearing no.103 (First Floor) Tower-B, admeasuring 1990 sq. ft., along with car parking space in the project known as "Tashee Capital Gateway" situated at sector-111, Gurugram, Haryana, to them.
6. That, it is pertinent to mention here that initially, the total cost of the apartment was less but due to increase in the super area, the final cost of the apartment increased to Rs.86,90,354/- only and since, it was a construction linked plan, hence the payment was to be made on the basis of schedule of payment provided by the respondent.
7. That, it is pertinent to mention here that the complainants had already paid the entire amount towards the cost of the property except the last instalment of 5%, which becomes due and payable only at the time of offer of possession by the respondents.



8. That, it was represented to the complainants, by the respondents, by way of various advertisements, that the project in question shall be constructed, developed, and designed by a team of ace architects and structural designers to meet world class infrastructure quality and standards. The complainants were induced by the respondents of the respondents/promoters and thereby purchased the property in question.
9. That, in the said buyer's agreement dated 08.01.2014, the respondent has categorically stated that the possession of the said apartment would be handed over to the complainants within 36 months from the date of sanction of the building plans of the colony, excluding a further grace period of 6 months.
10. That, the said buyer's agreement is totally one sided which impose completely biased terms and conditions upon the complainants, thereby tilting the balance of power in favour of the respondent, which is further manifest from the fact that the delay in handing over the possession by the respondents would attract only a meagre penalty of Rs. 5/- per sq. ft. on the super area of the flat, on monthly basis.
11. That, the respondents have compromised with levels of quality and is guilty of mis-selling. There is various deviation from the initial representations. The respondents marketed



luxury high end apartments, but they have compromised even with the basic features, designs and quality to save cost. The structure, which has been constructed, on face of it is of extremely poor quality. The construction is totally unplanned, with sub-standard, low grade, defective and despicable construction quality.

12. That the respondents have breached the fundamental terms of the contract by the inordinately delaying in delivery of the possession by 43 months. The complainants were made to make advance deposit on the basis of information contained in the brochure, which is false on the face of it as is evident from the construction done at site so far.
13. That, it worth mentioning here that the complainants vide their emails addressed to the respondents have asked to indemnify them, from the delay in handing over the possession of the apartment but they had miserably failed to accede to their legitimate request and has turned a deaf ear.
14. That, the complainants, without any default, had been timely paying the instalments towards the property, as and when demanded by the respondents. The respondents have promised to complete the project by June,2017 including the grace period of six months. The buyer's agreement was executed on 08.01.2014 and the respondents offered a defective possession on 07.02.2020, without obtaining the



occupation certificate from the Town and Country planning Department, Panchkula, in order to extract the balance payment from the complainants, which resulted in extreme kind of mental distress, pain and agony to the complainants.

15. That, the respondents have breached the fundamental term of the contract by inordinately delaying in delivery of the possession. The respondents have committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of the flat in question and not giving the interest and compensation to the buyer as per the provisions of the Act.

C. Relief sought by the complainants

16. The complainants have sought following relief(s):
- (i) Direct the respondents to handover the possession of the project to the complainants, after obtaining the occupation certificate from the tower and Country Planning, Haryana, in a time bound manner.
 - (ii) Direct the respondents to pay interest@ 18% p.a. as interest towards delay in handing over the property in question as per provisions of The Real Estate (Regulation and Development) Act, 2016("RERA") and Haryana Real Estate (Regulation and development) Rules, 2017 ("HRERA");



17. The authority issued a notice dated 29.01.2021 of the complaint to the respondents by speed post and also on the given email address at info@tashee.in and info@tasheegroup.com. The delivery reports have been placed in the file. Thereafter, a reminder notice dated 18.06.2021 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.
18. 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 complainants.

E. Jurisdiction of the authority

19. 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 complainants

Relief sought by the complainants: 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.

20. In the present complaint, the complainants intend to continue with the project and are 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.”

21. Clause (2.1) of the flat buyer's 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.

22. 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 complainants 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 allottees are left with no option but to sign on the dotted lines.

23. **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 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.

24. **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.

25. 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."

26. 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%.



27. The definition of term 'interest' as defined under section 2(z) 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;"*

28. Therefore, interest on the delay payments from the complainants 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 complainants in case of delayed possession charges.
29. 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 08.01.2014, 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 allottees 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.

30. The allottees requested for fresh statement of account of the unit based on the above determinations of the authority.

H. Directions of the authority

31. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure



compliance of obligations casted upon the promoters as per the functions 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 allottees, 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 allottees then, the balance delay possession charges shall be paid after adjustment of the outstanding against the allottees.
- 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 allottees 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 allottees before 10th of the subsequent month as per rule 16(2) of the rules.



- v. The complainants are 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 allottees, 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 complainants 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 allottees statement of account within one month of issue of this order. If there is any objection by the allottees on statement of account, the same be filed with promoters after fifteen days thereafter. In case the grievance of the allottees 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.

32. Complaint stands disposed of.

33. 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