

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

Complaint no. : 3907 of 2020
First date of hearing : 12.01.2021
Date of decision : 09.07.2021

Veena Jain
R/o: - G-5, Satya Shanti Apartment,
Plot no. 23, Sector-13, Rohini,
New Delhi-110085

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,
Connaught Place, New Delhi- 110001

Respondents

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Sh. Rishabh Jain
Sh.

Advocate for the complainant
Advocate for the respondents

EX-PARTE ORDER

1. The present complaint dated 26.11.2020 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 promoters 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 21.03.2015 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 promoters/respondents 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.	304, 3 rd floor, tower E [Page no. 41 of complaint]
9.	Unit measuring	1760 sq. ft. [Page No. 41 of the complaint]
10.	Date of execution of Flat buyer agreement	21.03.2015 [page no. 39 of complaint]
11.	Payment plan	Construction linked payment plan [Page no. 73 of complaint]
12.	Total consideration	Rs.74,01,640/- [As alleged by the complainant in brief facts on page no.16 of the complaint]
13.	Total amount paid by the complainants	Rs. 73,00,629/- [As per summery detail of payment page no.73 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 21 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.	6 years 1 month and 2 days



	09.07.2021	
16.	Status of the project	On going

B. Facts of the complaint

4. The respondents published vary attractive brochure, highlighting the Group Housing Colony called 'Capital Gateway', at sector 111, Gurugram, Haryana, the respondent claimed to be one of the best and finest in construction and one of the best and finest in construction and one of the leading real estate developers of the country, in order to lure prospective customers to buy apartment in the project including the complainant. There are fraudulent representations, incorrect and false statement in the brochure. The complainant invited attention of the hon'ble Chairman of Haryana Real Estate Regulatory Authority, Gurugram to section 12 of the Act, 2016. The project was launched in 2011 with the promise to deliver the possession on time and huge funds were collected over the period by the respondents.
5. The complainant submitted that Mr. Sharda Jain of Paras Properties originally booked an apartment measuring 1695 sq. ft. in Capital 'Gateway' in Gurugram on 18.02.2011. The original allottee was approached by the sale representatives

of the company, who made tall claims about the project 'Capital Gateway' as the world class project. He was invited to the sales officer and was lavishly entertained, and promises were made to him that the possession of his apartment would be handed over by 12.09.2018 including that of parking, parks, club and other common areas. He was impressed by their oral statement and representations and ultimately lured to pay a total of Rs.15,16,885/- in February,2011

6. The complainant purchased the apartment from the original allottee, Mr. Sharad Jain of 'paras properties' on 13.07.2012 and applied for transfer of the same in the records of the respondents. The original allottee had already paid Rs.15,16,885/- including service tax to the respondents against the said apartment. Therefore, the said amount was credited in the name of the complainant by the respondents after accepting the transfer of said apartment in the name of the complainant. Thus, the complainant became the purchaser of apartment having super area of 1695 sq. ft., Property ID-PR-0566, in the project, 'Capital Gateway' of the respondents.
7. The demands of the respondents, the complainant paid a total sum of Rs.47,21,104/- upto 04.12.2014 out of the total basic sale price of Rs.56,35,875/- i.e. more than 80% of the cost of the apartment before the execution of flat buyer's agreement.

The respondents failed to execute agreement to sell even after repeated requests of the complainant. The respondent violated section 13 of the act, 2016 by taking more than ten per cent (10%) cost of the apartment before the execution of the agreement to sell.

8. The flat buyer's agreement was executed on 21.03.2015 between the parties for the apartment no. 304, 3rd floor tower E having super area of 1760 sq. ft. in the project, 'Capital Gateway' of the respondents at sector 111, village Chauma, District Gurugram, Haryana for the sale consideration of Rs. 74,01,640/- including EDC, IDC, PLC, Club Membership and one covered car parking, etc.
9. Despite receiving 100% payable amount of the apartment for the complainant, the respondents unfortunately failed to honour the terms of flat buyer's agreement. For giving possession of the apartment of the complainant in the prescribed time limit. The complainant has paid all payable amount, as when demanded by the respondents, a total of Rs.73,00,629/- has been paid till date by the complainant for the apartment.
10. The complainant had approached the respondents and pleaded for delivery of possession of her apartment as per the agreement to sell on various occasions. The respondents



did not reply to her letters, emails, personal visits, telephone calls, seeking information about the status of the project and delivery of possession of her apartment, thereby the respondent violated section 19 of the Act, 2016.

11. The respondents responsible and accountable to the terms and conditions prescribed in the agreement to sell. The respondents are bound to pay the interest on the deposit amount to the allottee. If there is a delay in handing over the possession of the apartment.
12. The respondents have in an unfair manner siphoned off funds meant for the project and utilised some for their own benefits for no cost. The respondents being builder, promoter, colonizer, and developer whenever in need of funds from bankers or investors ordinarily have to pay a heavy interest per annum. However, in the present scenario the respondents utilised funds collected from the complainant and other buyers for their own good in other projects, being developed by the respondents.
13. In the given premise and circumstances, it is submitted that the respondents/sellers/builders/promoters/owners are habitual of making false promises and have deceptive behaviour. The respondents have earned enough money by duping the innocent complainant and other such buyers



through their unfair trade practice and deficiencies in services and have caused the complainant enough pain, mental trouble, agony, harassment, stress, anxiety, financial loss and injury.

C. Relief(s) sought by the complainant:

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

(i) Direct the respondents to complete the construction of the apartment along with common area facilities and amenities like community centre, parking, parks, etc. immediately and hand over the legal and rightful possession of the apartment to the complainant.

(ii) Direct the respondents to pay interest of every month of delay in offering the possession of the apartment since 21.09.2018 to the complainant on the amount taken from the complainant for the aforesaid apartment at the prescribed rate as per the Act, 2016 till the respondent hands over the legal and rightful possession of the apartment to the complainant.

15. The authority issued a notice dated 03.12.2020 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 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.

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: Directs 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 delayed 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'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.

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. Admissibility of delay possession charges at prescribed

rate of interest: The complainant is seeking delay possession charges at the rate of 24% p.a. however, proviso to section 18 provides 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 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 homer 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 promoters, 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 21.03.2015, 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 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.


(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

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