BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 3276 of 2020
First date of hearing: 13.11.2020
Date of decision : 09.07.2021

Syed Samir Ahmed
R/o: -C 5 A/135, First Floor,
Janakpuri, Near Kadimi Market,
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 **Chairman**
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Sh. Sushil Yadav Advocate for the complainant
None Present Advocate for the respondents

EX-PARTE ORDER

1. The present complaint dated 12.10.2020 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 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 10.05.2013 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 2011dated 16.04.2011 valid till 15.04.2024

5.	Name of licensee	KNS Infracon Pvt Ltd
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, 4th floor, tower D [Page no.17of complaint]
9.	Unit measuring	1695 sq. ft. [super area]
10.	Date of execution of Flat buyer agreement	29.01.2013 [page no. 15 of complaint]
11.	Payment plan	Construction linked payment plan [Page no.49 of complaint]
12.	Total consideration	Rs.75,91,064/- including tax [as alleged by complainant in his brief facts page no. 6 of complaint]
13.	Total amount paid by the complainant	Rs.70,70,020/- [as alleged by complainant in his brief facts page no. 6 of 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 23 of complaint]	07.06.2015 As per information obtained by planning branch building plan approved i.e. 07.06.2012. [Grace period is 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. That the respondents gave advertisement in various leading newspapers about their forthcoming project named "Capital Gateway sector 111", Gurgaon promising various advantage, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondents in the aforementioned advertisements complainant, booked an apartment/flat measuring 1295 sq. Ft. In aforesaid project of the respondents for total sale consideration in Rs.75,91,064/- which includes BSP, car parking, IFMS, club membership, PLC etc.

5. The complainant made payment of Rs.70,70,020/- to the respondents vide different cheques on different dates.

6. The flat buyer's agreement was executed on dated 29.01.2013 and as per flat buyer agreement the respondents had allotted a unit/flat bearing no. D-401 have super area of 1695 sq. Ft. to the complainant. That as per para no.2.1 of the agreement, the respondent had agreed to deliver the possession of the flat within 36 from sanctioning of building plan i.e. 07.06.2012 with an extended period of 180 days.

7. That the complainant used to telephonically ask the respondent about the progress of the project and the respondent always gave false impression that the work is

going is going in full mode and accordingly asked for the payments which the complaint gave on time and the complainant when visited to the site was shocked and surprised to see that construction work is not in and no was present at the site to address the queries of the complainant. It appears that respondents have played fraud upon the complainant. The only intention of the respondent was to take payments for the flat without completing the work and not handing over the possession on time. The respondent mala-fide and dishonest motives and intention cheated and defrauded the complaint. That despite receiving of 95% approximately payments on time for all the demands raised by the respondent for the aid flat and despite repeating requests and reminders over phone calls and personal visits of the complainant, the respondents have failed to deliver the possession of the allotted flat to the complainant within stipulated period

8. That it could be seen that the construction of the block in which the complainant flat was booked with a promise by the respondent to deliver the flat by 25.08.2016 but was not completed within time for the reasons best known to the respondent, which clearly shows that ulterior motive of the respondents was to extract money from the innocent people fraudulently.

9. As per clause 2.3 of the agreement it was agreed by the respondents that in case of any delay, the respondents shall pay to the complainant a compensation @Rs-5/- pre sq. ft. per month of the super area of the flat. It is, however, pertinent to mention here that a clause of compensation at such a normal rate of Rs-5/- per sq. ft. per month for the period if delay is unjust and the respondents has exploited the complainant by not providing the possession of the flat even after a delay for the agreed possession plan. The respondents cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the respondents have incorporated the clause in one sided buyer's agreement and offered to pay a sum of Rs-5/- per sq. ft. for every month of delay

10. That the complainant has requested the respondent several times on making telephonic calls and also personally visiting the offices of the respondent to deliver possession of the flat in question along with prescribed interest on the amount deposited by the complainant, but respondents has flatly refused to do so. Thus, the respondents in a pre-planned manner defrauded the complainant with his hared earned money and wrongful gains himself and caused wrongful loss to the complainant.

C. Relief sought by the complainant:

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

    (i) 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;

12. The authority issued a notice dated 16.10.2020 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 notices, 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.

13. 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 complainat.

E. Jurisdiction of the authority

14. 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.

15. 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."*

16. 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.*

17. 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 favor 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 doted lines.

18. **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.*

19. **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.

20. 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."

21. 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%.

22. 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 promoters 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;"

23. 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.

24. On consideration of the documents available on record and submissions made by both the parties 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 29.01.2013, 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.

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

H. Directions of the authority

26. 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 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 promoter 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 promoter, 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 promoter 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 complainants which is not the part of the agreement. However holding charges shall not be charged by the promoter 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 promoter 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.

27. Complaint stands disposed of.

28. 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 02.09.2021