HARYANA REAL ESTATE REGULATORY AUTHORITY
PANCHKULA, HARYANA

Comp Nos. :

1. RERA-PKL607/2018 (5th Hearing)

Vivek Kadyan ...Complainant

Versus

1.M/s TDI Infrastructure Ltd. ...Respondents

2. Sh. Pankaj Kohli (Vice President)

3. Sh. Amit Awasthi (Manager)

2. RERA-PKL630/2018(4th Hearing)

Jyoti Mor ...Complainant

Versus

M/s TDI Infrastructure Ltd. ...Respondent

3. RERA-PKL631/2018(4th Hearing)

Sunil Mor ...Complainant

Versus

M/s TDI Infrastructure Ltd. ...Respondent

Date of Hearing : 29.01.2019

CORAM :

Sh. Rajan Gupta **Chairman**
Sh. Anil Kumar Panwar **Member**
Sh. Dilbag Singh Sihag **Member**

APPEARANCE :

Sh. Vivek Kadyan in Comp. No. 607-2018 **Complainant in Person**
Sh. Kamal Dhaiya Comp. No. 630 & 631-2018 **Counsel for Complainant**
Shri Shobit Phutela **Counsel for Respondent (M/s TDI Infrastructure Ltd.)**

Order:

1. All captioned cases are being dealt with together in this order because the grievances involved therein are similar in nature and are directed against the same project of the respondent M/s TDI Infrastructure Pvt. Ltd. Facts of the lead case in **Complaint No. 607 of 2018 Vivek Kadyan vs. M/s. TDI Infrastructure Pvt. Ltd.** are being taken into consideration for disposal of the matters.

2. After hearing of the matter on 20.11.2018, the Authority had tentatively observed that increase of 20% in super area does not appear to be justified. Relevant portion of the said order is reproduced below:

> "5. Apart from the compensation for delay, the other grouse of the complainant is relating to arbitrary increase in the super area of the apartment by nearly 20%. The Authority tentatively observes that such a huge increase in the super area does not appear to be justified. Even if, it is considered that some of the plans especially of the common area and community building etc. are finalized by the builders later on, it could result into some variations in the super area but such variations are expected to be in the range of 5 to 10%. Increase of 20% in super area does not appear to be justified.
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> At this stage, learned counsel for the respondents sought adjournment from the Authority for furnishing details relating to the increase in super area.
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> 6. The respondents are directed to submit information relating to increase in super area in a tabulated form. They shall submit original

layout plan and the revised sanctioned layout plan. In the comparative table, each component of the super area shall be stated clearly and the same shall be compared with the super area proposed to be charged. The Authority will examine each component in detail and will decide this issue thereafter.

It also observes that if the super area was increased on the basis of revised layout plans, then as per law and as per conditions of the license, consent of 2/3rd allottees should have been obtained. Respondents shall also clearly state whether such a consent was obtained by the respondents or not."

Thereafter, the matter was listed for hearing on three different dates in which the respondent kept asking for more time to furnish requisite information.

3. Today learned Counsel for respondent no.1 and his architect are present along with approved layout plan dated 12.02.2015 to justify the increase in carpet area as well as super area. The respondent no.1 also furnished the information in compliance of order dated 20.12.2018.

4. It has been pointed out by complainant that certain amounts mentioned in the order dated 20.11.2018 are not related to his complaint. Therefore, the actual facts of the lead case **Complaint No. 607 of 2018 Vivek Kadyan vs. M/s. TDI Infrastructure Pvt. Ltd.** are stated in this order:

Ld. Counsel for complainant states that the complainant had booked a flat in the project named "Espania Royale Floor (KRF)" of the

respondent no.1 situated in Kamaspur, NH-1, Kundli, Sonipat. Flat No. RF-07/Duplex measuring 1499 sq. ft. was allotted to him on 04.01.2013. Flat Buyers Agreement (herein after referred to as FBA) was executed on 28.03.2013. Payments were to be made under Construction linked payment plan. As per clause 28 of FBA, delivery of the flat was to be made within 30 months from the date of execution of FBA. Thus the deemed date of delivery was 28.09.2015.

The complainant has paid about Rs.38,02,000/- against the Basic Sale Price of Rs. 36,00,000/- till date. Total sale consideration was Rs./- Rs.40,27,515/-.

The complainant has paid about 90% of the sale consideration. The complainant is aggrieved on account of about three years delay in delivery of the possession. Complainant repeatedly requested the respondent no.1 to deliver the flat but the respondent no.1 instead of delivering the possession of the flat, raised further demands for payment of installments.

Another grouse of the complainant is that the respondent no.1 has issued an Offer of Possession cum demand letter for fit out on 01.09.2018 along with an additional demand of Rs.13,32,298/-. He is further aggrieved on account of imposition of Rs.11,800/- towards miscellaneous charges, Rs.50,000/- towards club charges and other demands raised vide Offer of Possession cum demand letter for fit out dated 01.09.2018.

The complainant also states that the respondent no.1 has unilaterally increased the super area by 284.810 sq.fts. which has put an additional financial burden on him of Rs.6,84,000/-. The complainant objected against the unilateral increase in area and other additional demands. He sent a representation dated 10.09.2018 to the respondent no.1 but the respondent no.1 has failed to reply till date.

Now the complainant has filed the present complaint before this Authority seeking delivery of possession along with compensation for delay in offering possession. He is also seeking quashing of the demand letter dated 01.09.2018 in which the respondent no.1 has demanded additional amount of Rs.13,32,298/- and to direct the respondent no.1 to rectify unilateral increase in super area.

5. The respondent no.1 has denied all the allegations and raised several preliminary objections as follows:

i) The provisions of Real Estate (Regulation and Development) Act, 2016 are not applicable to the present case because the agreement was executed between the parties prior to the coming into force of the Act, hence the agreement entered into between the parties shall be binding on the parties and cannot be reopened.

ii) This Authority does not have jurisdiction to entertain this complaint because this project covered under license Nos. 70 of

2012 has not been registered with the Authority, because it is neither registered nor registerable, the Authority has no jurisdiction to entertain any complaint in this regard.

iii) Respondent no.1 also denies the jurisdiction of this Authority on the ground that the nature of the allegations of the complainant is such that the same could be filed only before the Adjudicating Officer u/s 71 of the Act.

iv) In terms of the provisions of Rule 2(o) of the HRERA Rules, 2017, this project cannot be categorized as On-going Project for which also this Authority does not have jurisdiction to entertain this complaint. The respondent states that he had applied for grant of Occupation Certificate on 31.03.2017.

v) Respondent no.1 states that delivery could not be made due to pendency of the application for Occupation certificate with the Director, Town & Country Planning department since 31.03.2017. The respondent no.1 has further denied any wilful default in delivery of the Flat and stated in its reply that the construction is complete and once OC is granted by the Town & Country Planning Department, possession of the Flat will be immediately offered to the complainant.

6. Other than challenging the jurisdiction, respondent no.1 has not submitted any substantial fact to deny the allegations made by the complainant. The respondent no.1 has admitted the payments deposited by the complainant but state that an amount of Rs.13,32,298 is still outstanding against the complainant. The respondent no.1 also submits that the Agreement was not one sided as the complainant had executed the buyer's agreement without any objection, thus both the parties are bound by the terms and conditions of the agreement. The respondent no.1 has in a very general term, labelled the complaint as false, frivolous and misleading. He further states that the area of the flat measuring 1499 sq. fts. at the time booking was tentative and is subject to change till the construction of the building is complete. Now final calculation of the super area comes to 1783.8 sq. fts. He states that he is entitled to charge for increase in area due to change in layout plan or any other alterations, which shall be determined at the time when the construction is complete and OC is granted by the concerned department as per terms and conditions of FBA. Hence the complainant is liable to pay for any change/ increase in super area as per clause 5 & 6 of FBA.

7. The Authority has considered the written and oral pleadings of both the parties in detail. It observes and orders as follows:-

i) First of all the respondent no.1 has challenged the jurisdiction of this Authority for the reason that the agreement between the parties was executed prior to coming into force of RERA Act. This objection is not sustainable in view of the detailed orders passed by this Authority in **Complaint Case No.144- Sanju Jain Vs. TDI Infrastructure Ltd.** The logic and reasoning in that complaint are fully applicable on the facts of this case as well. The Authority has repeatedly ruled that RERA Act, 2016 is comprised of two distinct parts, first, relating to the registration of the new and ongoing projects which seeks to inform prospective buyers of the true nature of the real estate projects; and the second part for safeguarding the interest of the buyers of property in new as well as old projects in respect of which the obligations under the law still subsists on the part of either of the parties. Admittedly, possession in the current cases has still not been handed over. The occupation certificate though applied for has still not been obtained. The conveyance deed has not been executed. In simple words the core of the transaction between the developer and the allottee still remains to be fulfilled. The RERA Act, has been enacted to deal with all such situations and for providing a level playing field to both the

parties. Accordingly, the objection relating to jurisdiction of this Authority are not sustainable.

ii) The second plea of the respondent no.1 regarding lack of the jurisdiction is that such complaint could be preferred only before the Adjudicating Officer. This also is completely devoid of merit. The institution of Adjudicating Officer is meant to determine the un-liquidated damages arising out of non-performance of full or a part of the contract. The core of the contract falls within the jurisdiction of the Authority only.

iii) Admittedly, floor-buyer agreement between the parties was executed on 28.03.2013. As per clause 28 of the Agreement the delivery was to be made within 30 months from the date of execution of FBA. Therefore, there is no controversy that as per floor buyer agreement the deemed date of possession of the unit was 28.09.2015. The payments made by the complainant to the respondent no.1 are also admitted. It is also an admitted fact that the project in question is nearing completion and occupation certificate thereof has also been applied for on 31.03.2017. The respondent no.1 further states that he is hopeful that the same will be granted soon. He states that the unit is ready for delivery of possession and even an offer of fit out possession has already

been made on 01.09.2018. The respondent no.1 states that the flat will be ready for delivery in all aspects by July, 2019. If the respondent no.1 delivers the apartment by July, 2019, it will be with delay of about three years from the deemed date of handing over the possession.

In the circumstances when the project is almost complete and the possession is likely to be offered, even though with delay, it does not justify refund of the money paid by the complainant. Complainant has chosen to be a part of this under construction project and some delay in such projects is not unexpected. However, the complainant is entitled to be compensated for the delay. This Authority has disposed of a bunch of petitions with the lead case **Complaint No.113 of 2018 titled Madhu Sareen V/S BPTP Ltd**. There was consensus on all the issues except on the issue of compensation for delayed delivery of possession. Further logic and arguments in this regard were given by the dissenting member in **Complaint case No.49 of 2018- Parkash Chand Arohi V/s Pivotal Infrastructures Pvt. Ltd**. It is hereby ordered that the ratio of the said judgements will

be fully applicable in this case for determining the quantum of compensation for delayed delivery of possession.

In these circumstances, the Authority directs the respondent no.1 to handover the possession of the flat to the complainant by July, 2019.

8. Next grievance of the complainant is that the respondent no.1 has raised an additional demand of Rs. 13,32,298/- along with the offer of possession. During the course of arguments, the complainant has agreed to pay miscellaneous expenses and charges on account of interest free maintenance security. Now, the only dispute pending is regarding demand on account of Club Membership Charges and External Development Charges.

Since the complainant has limited his grievance to the additional demands on account of Club Membership Charges, External Development Charges and increase in area and is not pressing for other demands, therefore the Authority is adjudicating here with regard to each of the above three disputes raised by the complainant, which is ordered as follows:-

A. **Club Membership Charges**:- With regard to the club membership charges there is no provision in the builder-buyer agreement specifying a particular amount which is payable by the complainant for club membership in addition to the total sale consideration. Admittedly, the club building is yet to be constructed. When the club is not in existence, the demand on account of club membership charges is unjustified and is accordingly quashed.

B. **External Development Charges**:- External Development charges are the charges to be paid to the State Government for laying external services of the colony by the State Government agencies. This amount is payable to the State Government. The total EDC Charges payable for the whole of the colony is apportioned amongst all the apartments/holders of the colony. Accordingly, the External Development Charges shall be paid by the complainant. This direction however, is subject to the condition that the respondent developer shall inform to the complainant the total EDC payable for whole of the colony and the method of calculating

proportionate share to be paid by the complainant. The actual calculation shall show that total EDC charged from him is correctly worked out and correctly apportioned amongst all the apartments. If the said calculation is correct the complainant shall the amount.

C. **Increase In Area :** The case of the complainant is that as per clause1 of the agreement dated 28.03.2013 it was agreed that the super area of the flat shall be 1499 Sq.ft. In clause (1) of the agreement definition of the super area is as shown in Annexure-I of the agreement. The definition of the super area in Annexure-I is reproduced below:-

> " Super Area for the purpose of calculating the sale price in respect of the said Apartment shall be the sum of Apartment area of the said Apartment and its pro-rata share of common areas in the entire building.
>
> Whereas the Apartment area of the said Apartment, shall mean the entire area enclosed by its periphery walls including area under walls, columns, balconies cupboards and lofts etc. and half the area of common walls with other premises/independent

Floors/Apartment , which from integral part od Said Apartment and Common area shall mean all such parts / areas in the-entire said building which the Allottee shall use by sharing with other occupants of the said building including entrance corridors and passages, staircase, mumties, service areas including but not limited to machine room, Overhead water tank, maintenance office / store etc., architectural feature, if provided and security fire control rooms.

Super Area of the Apartment provided with exclusive open terrace(s) shall also include area of such terrace(s); the purchaser however, shall not be permitted to cover such terrace(s) and shall use the same as open terrace only and in no other manner whatsoever."

It further reads as follows:-

"It is further clarified that the super area mentioned in the Agreement is tentative and for the purpose of computing sale price in respect of said Floor only and that the inclusion of common areas within the said building for the purpose of calculating super area does not give any right, title or interst in common areas to

the Buyer except the right to use common areas by sharing with other occupants/allottees in the said building subject to timely payment of maintenance charges."

Clause (2) of the agreement reads as follows:

"The super area stated in this Agreement is tentative and is subject to change till the construction of the said Building is complete. The final super area of the said Floor shall be confirmed by the Company only after the construction of the said building is complete and occupation certificate is granted by the competent authority(ies). As such, the total price payable for the said Floor shall be recalculated upon confirmation by the Company of the final super area of the said Floor. If there will be an increase in super area, the Buyer agrees and undertakes to pay for the increase in super area immediately on demand by the company, without any interest, on the rate as agreed herein, and if there shall be a reduction in the super area, then the refundable amount due to the Buyer shall be adjusted by the Company from the final installment as set forth in the Schedule of Payments in Annexure-II."

> Clause (6) of the agreement provides that in the event of increase or decrease to the extent that 10% to the agreed area of the apartment, the adjustment in the payments shall be made as per the basic rate, however, if the increase or decrease is more than 10% then it shall be the company which shall have the sole discretion to fix the rate for such an increase or decrease.

The flat buyer agreement was executed on 28.3.2013. However, plans of the colony were got approved from the appropriate authority of the State Government on 12.2.2015. As per agreement the super area of the apartment was 1499 sq.ft. whereas the respondents are seeking to charge the complainant for super area measuring 1783.5 sq.ft. which represents an increase of 284.81 sq.ft. amounting to an increase of 19 percent. This is a huge variation from the agreed carpet area which has put an additional financial burden of Rs.6,84,000/- upon the complainant, which the complainants are agitating as being unfair and unjustified.

The Authority in its earlier orders dated 20.11.2018 had assumed that when the agreement was made the plans had

already been approved which underwent changes later on resulting in increase in the super area. However, it has now transpired that on the date of the agreement the plans had not been approved. They were for the first time approved in February, 2015. Therefore, a comparison of the super are is obviously not possible. Authority, therefore, shall determine whether the super area for which the payment is being demanded by the respondents is justified or not.

The respondents have placed before the Authority approved plans of the apartment as well as a comparative chart of the super area. In the chart a comparison has been drawn between the areas as per the marketing plan and as per the sanctioned plan. After careful examination of the matter and after hearing both the parties, the Authority orders as follows:-

i) **Covered Area**: In the marketing plan the covered area was proposed to be 1217 sq.ft. whereas as per sanctioned plan it has become 1252 sq.ft. The explanation for this increase is that the earlier calculation of the carpet area was done by taking

external walls of 4.5" width whereas the actual external walls are of 9" width. The carpet area of an apartment is determined after accounting for full width of the external walls provided they are not shared with any other apartment. If an external wall is shared with an adjoining apartment then only 50% of the width of such external wall shall be taken into account. After discussion of this principle the complainant agrees that the carpet area of the apartment may be determined as 1252 sq.ft.

ii) **Balcony plus projection area:-** As per plan and the actual calculation at the site the balcony plus projection area comes to 208 sq.ft. In the marketing plan however, it was proposed to be 165 sq.ft. The width as well as length of the balcony has actually increased in the sanctioned plan compared with the marketing plan. Since the actual balcony is 208 sq.ft., therefore, the

complainant is bound to pay for it. Accordingly the complainant shall pay for balconies of 208 sq.ft.

iii) **Shaft Area:** The Authority examined the sanctioned plan of the apartment and found that a plumbing shaft has been provided which is enclosed on three sides and open on fourth side. Detailed examination of the shaft revealed that each of the three walls are actually external walls of one or the other apartments. Since entire external wall of the apartments has been accounted for in the carpet area of the apartment, now the same wall cannot be allowed to be charged in the form of plumbing shaft. The plumbing shaft in this case shall be considered an external open area. No additional construction, which has not been charged as carpet area, has taken place in the shaft. Also, provision of services is a part of the agreement, therefore, the cost proposed to be charged on account of the shaft is not justified at all. Accordingly, 18 sq.ft. of the shaft

area is disallowed and shall be deducted from the super area of the apartment.

iv) **Circulation Area:** In the marketing plan circulation area was proposed to be 130 sq.ft., whereas 163 sq.ft. is being charged on the basis of the actual sanctioned plan. The circulation area is comprised of corridors, lift-lobbies, entrance lobbies etc. It also includes lift areas. It is intended to facilitate horizontal and vertical movement within the apartment complex. This is a necessary feature of the housing complex. The complainants are duty bound to pay for it.

The complainants, however, shall pay only for the total circulation area divided by the total number of apartments in the complex/tower. Since calculation of the circulation area has not been challenged, the complainants shall pay for the proportionate circulation area measuring 163 sq.ft. However, in case they find that the actual circulation area is less than 163 sq.ft. they may

represent accordingly to the respondent or may approach this Authority on a later date, again.

v) **Steel stair case area:** The respondents are charging 56 sq.ft. as proportionate share of the common steel stair case. Since, this is a fire escape facility, for the residents they have to pay for it. However, if the actual proportionate area of the stair case is less than 56 sq. fts., the respondent shall charge accordingly, and the complainants shall retain their rights to approach this Authority once again in case they find any discrepancy in the calculations. This, however, is further subject to the condition that this fire escape facility has been provided in accordance with sanctioned plan.

vi) **Mumty/machine room/water tanks area:-** Typically, a Mumty is a shed made over the staircase leading to the top terrace. Machine room is a covering over the machines installed for the usage of the building, like the roof cast over the lift

area and other similar facilities. Water tanks are usually kept open on the terrace area and sometime a roof is constructed over them for protection from rain etc.

The water tanks, machines, mumties etc. are a part of the basic services provided in an apartment/ complex. When a person purchases an apartment he presupposes provision of all basic services like drinking water, drainage, sewerage system, electricity supply, road and street light system etc. The cost of all such facilities is invariably a part of the overall cost of the apartments. Its cost is presumed to be included in the per square foot cost of the apartment.

Another facet of this issue is that entire super area is being charged at the same rate as the carpet area of the apartment. The carpet area of the apartment includes flooring, RCC roof, painting of the walls, conduiting, windows etc. The

cost per sq.ft. of the covered area containing all these facilities is entirely different from the cost per sft. of mumty, machine rooms or the water tanks area. Therefore, the cost per square foot of these facilities is much less than the cost per square foot of the carpet area. The facilities like mumty, machine room & water tanks areas can either be considered as a part of the services in the apartments therefore, not chargeable at all, or if there is a provision in the agreement for charging extra for these facilities then the same can be charged at the rate of the actual cost incurred divided proportionately amongst all the apartments, and not at the rate per sq. ft. of the carpet area.

The agreement made between the parties in regard to these facilities is rather vague. The respondent should have precisely defined the area to be calculated under such facilities and also the rates chargeable for the same, since costing

of these facilities has not been defined properly and unambiguously, they now have to be interpreted in a reasonable manner. This Authority therefore determines that the actual cost incurred on these facilities shall be worked out and that actual cost shall be divided amongst all apartments, and that proportionate actual cost along with 15% margin shall be charged from each of the allottee and the complainants. The areas of such various facilities cannot be allowed to be charged at the same rate as the carpet area of the apartment.

Accordingly, on the basis of the above principle 104.5 Sq. ft. area shall be deducted from the 1783.5 super area charged by the respondent. The respondent accordingly shall charge the complainant for only 1783.5 (-) 104.5 = 1679 sq. ft.

Additional Grounds in Complaint No.s 630/2018 & 631/2018

9. The complainants in Complaint Case No.630/2018 & 631/2018 states that the respondent no.1 has arbitrarily changed the layout plan

without seeking consent of the allottees including the complainants. He has converted green areas into commercial buildings and also constructed shops on the areas earmarked for Community Centre. The respondent no.1 has not even completed the project and is not in a position to handover the apartment.

On perusal of the record it is observed that this grievance of the complainant is misconceived since the area shown in green colour in the marketing plan is earmarked for further expansion, implying thereby that it was not meant for park or green spaces as contended by the complainants. As regards the construction of shops on the area earmarked for Community Centre, the respondent no.1 states that construction of the shops have been done as per plans sanctioned by the state government. Further, construction of a few shops at a location different from specified location has been stalled till an approval is received from the concerned department. The respondent no.1 undertakes that in case the department concerned does not approve the construction of shops at the changed location, he will demolish them. In view of the above, the Authority decides that the construction carried on as per the approved layout plan is valid, hence the complainant grievance in this regard is unfounded.

10. Now, the respondent no.1 is directed to issue a fresh statement of accounts to the complainant after recalculating the amounts receivable/payable from the complainant in accordance with this order. Further, the compensation payable to the complainant on account of delayed delivery of possession shall be shown in the statement of accounts and the net payable /receivable shall be calculated after accounting for the same. This statement shall be issued by the respondent no.1 within a period of 45 days of uploading of this order on the website. He shall also periodically apprise the complainant of the stage of construction of the project.

Disposed of accordingly. The file be consigned to the record room and the orders be uploaded on the website of the Authority.

Dilbag Singh Sihag	Anil Kumar Panwar	Rajan Gupta
Member	Member	Chairman