BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 5013 of 2020
First date of hearing: 04.03.2021
Date of decision : 13.10.2021

Prem Chand Nagpal
R/o: - C-8, First Floor, Mukhram Garden,
Tilak Nagar, New Delhi- 110018

Complainant

Versus

M/s RMG Developers Private Limited.
Corp. office: Unit No. SF-05, 2nd Floor,
Ninex City Mart, Sohna Road,
Sector-49, Gurugram

CORAM:
Dr. K.K Khandelwal — **Chairman**
Shri Samir Kumar — **Member**
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Sh. Jyoti Swroop Arora — Advocate for the complainant
None — Advocate for the respondent

EX-PARTE ORDER

1. The present complaint dated 19.01.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is *inter alia* prescribed that the promoter shall be responsible for all obligations, responsibilities and functions 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. The particulars of the project, the details of 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	"RMG Residency", Sector 37C, Gurugram
2.	Project area	5 acres
3.	Nature of the project	Affordable Group Housing Colony
4.	DTCP license no. and validity status	12 of 2015 dated 09.10.2015 valid up to 08.10.2020
5.	Name of licensee	RMG Developers Pvt. Ltd.
6.	RERA Registered/ not registered	Registered vide no. 206 of 2017 dated 15.09.2017
7.	RERA registration valid up to	31.12.2019
8.	Unit no.	312, 3rd floor, tower- 2, block-E [Page 55 of complaint]
9.	Unit measuring	618.798 sq. ft. [Carpet area] 80.623 sq. ft. [Balcony area]
10.	Date of execution of apartment buyer agreement	06.06.2017 [Page 54 of complaint]
11.	Payment plan	Time linked payment plan.

		[as per annexure- A Page 72 of complaint]
12.	Total consideration	Rs.28,44,823/- [as per statement of account at Page 174 of complaint]
13.	Total amount paid by the complainant	Rs.19,95,737/- [as per statement of account at Page 174 of complaint]
14.	Date of approval of building plans	21.12.2015 [page 44 of complaint]
15.	Date of Environment clearance	31.01.2017 [page 77 of complaint]
16.	Due date of delivery of possession as per clause 3.1 apartment buyer agreement 48 months from the date of approval of building plans or grant of Environment clearance whichever is later. [Page 58 of complaint]	31.01.2021 [Due date of possession is calculated from the date of environment clearance dated 31.01.2017]
17.	Delay in handing over possession till date of this order i.e. 13.10.2021	8 months and 13 days

B. Facts of the complaint

3. The complainant has made the following submissions in the complaint:-

I. That the respondent is a private company incorporated under the provisions of Companies Act 1956 bearing CIN U70109DL2006PTC150054 and having its registered office at khasra no. 300, Gopi Ram Building, Sultanpur Village, New Delhi-110030 and its corporate office at unit no. SF-05, 2nd floor, Ninex City Mart, Sohna Road, Sector-49, Gurugram, Haryana. It is further submitted that the complainant booked a 2 BHK apartment with carpet area of 618.798 sq. ft. @ Rs.4,000/- per sq. ft and balcony

area of 80.623 sq. ft. @ Rs.500/- per sq. ft. by signing a registration form for allotment and paid a booking amount of Rs.1,30,335/- (being 5% of the cost of apartment).

II. That the draw held on 01.06.2016 in the presence of officials from the offices of the DGTCP/Deputy Commissioner, Gurugram, the complainant was allotted a 2 BHK apartment no. 312, unit type 3 (2 BHK), tower-2, block E with a carpet area of 618.798 sq. ft. and balcony of 80.623 sq. ft. and accordingly received an allotment letter dated 2.06.2016 from respondent advising complainant to make payment of Rs. 5,03,101/- within 15 days from the date of allotment (i.e. on or before 16.06.2016) failing which an interest @ 15% per annum shall be charged and other consequences in terms of Affordable Housing Policy(hereinafter be called as 'AHP') shall follow.

III. That a pre-printed apartment buyer agreement imposing the terms and conditions unilaterally decided by respondent thereby unfairly exempting and wholly excluding respondent from any liability under the agreement and on the other hand, fastening the liability of non-performance/delay in performance on the complainant, was signed on 06.06.2017. It is further submitted that as per clause 2.2 of the agreement, the complainant was required to make payment of 20% of the total cost of the apartment at the time of allotment and pay balance 75% of the total cost of the apartment in six equated six-monthly installments spread over three years period from the date of allotment.

IV. That as per clause 5(iii)(b) of AHP read with clause 3.1 of agreement, the possession of the apartment is to be offered within

a period of 4 years from the date of approval of building plans or grant of environmental clearance whichever is later. The building plans were approved on 21.12.2015 and the environmental clearance was granted by State Environment Impact Assessment Authority, Haryana vide reference no. SEIAA/HR/2017/30 dated 31.01.2017. The commencement date of the project is 31.01.2017, and the possession is to be offered latest by 30.01.2021.

V. The kind attention of the authority is drawn to the provisions of clause 1(iv) of AHP which bars renewal of licenses beyond the said 4 years period from the date of commencement of project.

VI. That the payment of the total cost of the apartment was linked with time, its possession was linked to receipt of building plan /environmental clearance whichever is later. The complainant has made a total payment of Rs.19,95,737/- till 06.10.2018 which is equivalent to 75% of the cost of apartment.

VII. That on 19.08.2020, the complainant found a public notice in Dainik Bhaskar issued by M/s Vistra ITCL (India) Limited stating that they are the debenture trustee of Kautilya Finance BV (the debenture holder of respondent) and have filed a suit before Delhi High Court on 18.08.2020. When the complainant contacted respondent to clarify about the public notice and the suit filed before Delhi High Court, no clear response was given by respondent, and it was promised that the matter would be resolved soon. The complainant was surprised to see from the above orders of Delhi High Court **that that respondent has taken a loan of rupees thirty five crores from Kautilya Finance BV** (the debenture holders of respondent) for construction of the project

by issuing 35 debentures of Rs.1 crore each (totaling to Rs.35 crores) against the security of project land and buildings constructed thereon and has been alleged by **M/s Vistra ITCL (India) Limited** (acting as debenture trustee for and on behalf Kautilya Finance BV) **to have diverted rupees two crores to its Bank account in Allahabad Bank in violation of terms and conditions of debenture trust deed dated 11.07.2017** and therefore, M/s Vistra ITCL (India) Limited have approached Hon'ble Delhi High Court and Delhi High Court vide its order dated 20.08.2020 has restrained respondent from alienating, transferring or encumbering any property or any apartment unit in the project without the written approval of M/s Vistra ITCL (India) Limited .

VIII. The complainant inspected the public file of respondent which reveals following obligations: - i). Debenture trustee appointment agreement dated 11.07.2017 and memorandum of association of the respondent; ii). Deed of hypothecation dated 11.07.2017 iii). Memorandum of entry recording mortgage by deposit of title deeds along with a declaration-cum-undertaking for creation of equitable mortgage dated 26.07.2017; iv). Annual return of the respondent and extracts from XBRL filed by holding company for the financial year terminates on 31.03.2018 and the company master data of various corporate shareholders of ('Ninex Developers Limited') the holding company.

IX. The complainant has contented various issues relating to debenture trustee appointment agreement dated 11.07.2017 and memorandum of association of respondent; deed of hypothecation

dated 11.07.2017; declaration cum undertaking for creation of equitable mortgage dated 26.07.2017.

X. The complainant has further submitted that the respondent has transferred or assigned all his rights in the project including the project land and all buildings constructed or to be constructed thereon and the development right of the said project and all its right on the said project land etc. in favour of M/s Vistra ITCL (India) Limited without obtaining the prior written consent from two-third allottee and without the prior written approval of the authority thereby violating section 15(1) of Act. It is further submitted that the respondent having violated the provisions of section 15(1) of the Act, 2016 this authority may please declare assignment of all the rights in the project including the project land and all buildings constructed or to be constructed thereon and the development right of the project and all its right on the project land etc. by respondent in favour of M/s Vistra ITCL (India) Limited illegal and therefore, unenforceable against the complainant.

XI. That the complainant came to know by way of a public announcement dated 30.06.2019 that insolvency proceedings have started against the holding company of respondent. Annual return of respondent for the financial year ended 31.03.2018 reveal that the entire shareholding of respondent is held by holding company and Mr. Ram Mehar Garg and Mr. Sandeep Garg are the directors of the respondent company, who are controlling the entities. Further they are holding 100% of the paid-up capital of holding company which in turn is holding 100% paid up capital of respondent.

XII. That the construction work at the project site is progressing at snail pace and project is unlikely to be completed and offered for possession by 30.01.2021 thereby violating the DTCP regulations and putting the hard-earned money of the complainant at risk. The situation becomes alarming when seen in the backdrop of AHP 2013 which bars renewal of licenses beyond the said 4 years period from the date of commencement of the project.

XIII. That on 12.12.2020 complainant received a mail along with a notice dated 12.12.2020 from respondent threatening complainant to pay the outstanding demand of Rs.5,25,290/- within 15 days failing which respondent shall cancel the allotment.

XIV. The complainant visited the office of respondent on 15.12.2020 when he was advised by respondent that OC may take time and, in the meantime, complainant may like to take "fit out possession" by making payment of all outstanding amount detailed in a sheet titled "Final demand for fit out possession of apartment" handed over to complainant by respondent for fit out possession including the following illegal/unjustifiable payments.

C. Relief sought by the complainant:

4. The complainant has sought following relief(s).

i. To restrain respondent from cancelling the allotment of the apartment as the non-release of last installment by Allahabad Bank is attributable to the default of respondent itself;

ii. Direct the respondent to charge interest from complainant on delayed payment at an interest rate which complainant would have paid to Allahabad Bank, if there were no defaults by respondent.

iii. Direct the respondent to charge interest from complainant on delayed payment at Allahabad Bank home loan rate for a period of up to January 2021 and not beyond that even if some extension is granted by any competent authority on account of COVID-19 as the complainant itself would be a sufferer of this extension by way of delayed possession and interest payment even at Allahabad Bank home loan interest rate would be a double blow to complainant without any fault.

iv. To restraining respondent from demanding additional amount of Rs. 18,000/- towards operations & service Charges (1 year advance); Rs.20,000/- towards Interest Free Maintenance Security ("IFMS"); charging monthly maintenance charges after possession; Rs.28,000/- towards external electrification charges; Rs.9,000/- towards Electric meter charges and Rs. 52,000/- towards additional area of 13 sq.ft., from the complainant.

v. To issue appropriate directions to respondent to demand entire outstanding/remaining legitimate amount from the complainant at the time of offering of possession of the apartment.

5. The authority issued a notice dated 22.01.2021 of the complaint to the respondent by speed post and also on the given email address at rmg@gmail.com. The delivery reports have been placed in the file. Thereafter, a reminder notice dated 17.06.2021 for filing reply was sent to the respondents on email address at rmg@gmail.com. Despite service of notice, the respondents have preferred neither to put in appearance not file reply to the complaint within the stipulated period. Accordingly, the authority is left with no other option to proceed ex-parte proceeding dated 09.07.2021 against the respondent.

6. 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.

D. Written arguments on behalf of complainant:

- That the complainant has made a total payment of Rs.19,95,737/- as against the total cost of flat of Rs.25,15,504/ which works out to 79% of the cost of flat and is willing to pay the remaining amount but the Allahabad Bank (now Indian Bank) has refused to disburse the home loan as the respondent has defaulted on a loan of rupees thirty five crores which it took from Kautilya Finance BV ("lender") and has been dragged to Delhi High Court by the lender for diversion/siphoning of the funds in the violation of the terms of the loan agreement.
- That both respondent and its holding company are being owned, managed and controlled by two common directors Mr. Ram Mehar Garg and Mr. Sandeep Garg and it is due to their mismanagement and carelessness that respondent has been dragged to Delhi High Court by its lender for diversion/siphoning of funds and its holding company has gone into insolvency proceedings.
- The respondent has mortgaged the project land and all buildings constructed or to be constructed thereon, the development right of the project and all its rights on the project land ("mortgaged property") in favour of the lender without obtaining the prior written approval of this Authority and without obtaining prior written consent from two-third allottee of the project.

E. Jurisdiction of the authority

7. Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11(4)(a)***
>
> *Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee or the competent authority, as the case may be;*
>
> *The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.*
>
> ***Section 34-Functions of the Authority:***
>
> *34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.*

8. So, in view of the aforesaid provisions of the Act, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the relief sought by the complainant

F. I To restrain respondent from cancelling the allotment of the apartment as the non-release of last installment by

Allahabad Bank is attributable to the default of respondent itself.

9. As on date, the cause of action has not been arising with regard to the aforesaid reliefs. The respondent has not issued any document which relates to cancellation of the said unit till date, and it is mere contingency that the respondent may or may not issue any document. Therefore, the complainant is advised to approach the authority as and when cause of action arises.

F. II Direct the respondent to charge interest from complainant on delayed payment at Allahabad Bank home loan rate for a period of up to January 2021 and not beyond that even if some extension is granted by any competent authority on account of COVID-19 as the complainant itself would be a sufferer of this extension by way of delayed possession and interest payment even at Allahabad Bank home loan interest rate would be a double blow to complainant without any fault.

10. In the present complaint, the complainant intends to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act 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."*

11. Clause 3.1 of the apartment buyer's developer agreement (in short, the agreement) provides for handing over of possession and is reproduced below: -

Subject to force majeure circumstances, intervention of statutory authorities, receipt of occupation certificate and allottee having timely complied with all its obligations, formalities or documentation, as per prescribed by the Developer and not being in default under any part hereof and apartments buyer's agreements, including but not limited to the timely payment of installments of the other charges as per the payment plan, stamp duty and registration charges, the developer proposes to offer of possession of the said apartment to the allottee within 4 (four) years from the date of approval of building plans or grant of environment clearance whichever is later.

12. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to timely payment and 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 promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter 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 buyer developer agreement by the promoter is 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.

13. **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 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.*

14. 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.
15. 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., 13.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
16. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which

the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;*
> *(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"*

17. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent who is the same as is being granted to the complainant in case of delayed possession charges.

F.III To restraining respondent from demanding additional amount of Rs. 18,000/- towards operations & service Charges (1 year advance); Rs.20,000/- towards Interest Free Maintenance Security ("IFMS"); charging monthly maintenance charges after possession; Rs.28,000/- towards external electrification charges; Rs.9,000/- towards Electric meter charges and Rs. 52,000/- towards additional area of 13 sq.ft., from the complainant.

18. The authority observes that it is evident that the respondent has not yet obtained occupation certificate of the project in which the allotted unit of the complainant is located. So, without getting occupation certificate the builder /respondent is not competent to issue any intimation regarding prepossession. It is well settled that for a valid offer of possession there are three pre-requisites Firstly, it should be after receiving occupation certificate; Secondly, the subject unit should be in

habitable condition and thirdly, the offer must not be accompanied with any unreasonable demand. But while issuing final demand for fit out possession of the flat on 25.12.2020 vide email dated 25.12.2020 the builder has neither obtained occupation certificate. Hence, the final demand for fit out possession by respondent promoter on 25.12.2020 is not a valid or lawful demand for fit out possession/offer of possession.

19. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 3.1 of the apartment buyer agreement executed between the parties on 06.06.2017, the possession of the subject apartment was to be delivered within a period of 4 (four) years from the date of approval of building plans i.e. 21.12.2015 or grant of environment clearance i.e. 31.01.2017 whichever is later. Therefore, the due date of handing over possession is 31.01.2021. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainant as per the terms and conditions of the apartment buyer's agreement dated 06.06.2017 executed between the parties. Further, no OC/part OC has been granted to the project. Hence, this project is to be treated as on-

going project and the provisions of the Act shall be applicable equally to the builder as well as allottee.

20. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainant are entitled to delay possession charges at rate of the prescribed interest @ 9.30% p.a. w.e.f. 31.01.2021 till the handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

G. Directions of the authority

21. 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 promoter as per the function entrusted to the authority under section 34(f):

i. The respondent is 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. 31.01.2021 till the handing over of possession of the allotted unit through a valid offer of possession after obtaining the occupation certificate from the competent authority.

ii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

iii. The arrears of such interest accrued so far shall be paid to the complainant within 90 days from the date of this order. Thereafter the monthly interest shall be paid on 10th of every month as per rule 16(2) of the Rules.

iv. Occupation certificate has not yet been obtained by the respondent. The same be placed on record on receipt of the same from the competent authority.

v. No maintenance charges and other charges shall be levied till offer of possession after obtaining occupation certificate.

22. Complaint stands disposed of.

23. File be consigned to registry.

(Samir Kumar) Member		**(Vijay Kumar Goyal)** Member
	(Dr. K.K. Khandelwal) Chairman	
Haryana Real Estate Regulatory Authority, Gurugram		

Dated: 13.10.2021

Judgement uploaded on 11.01.2022.