

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

Complaint no. : 2308 of 2018
First date of hearing : 19.03.2019
Date of decision : 19.03.2019

1.Ms. Varsha Jain
2.Mr. Kirti Pardeep Jain
R/o. Flat no. 701, Block H,
Lagoon Apartments, Ambience Island,
Gurugram-122002

Complainants

Versus

1.M/s Magic Eye Developer Pvt. Ltd.
2. M/s Spire Developers Pvt. Ltd.
5D, Plaza M6, District Centre,
Jasola, New Delhi- 110025

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Chetan Dhingra Advocate for the complainant
Ms Neelam Gupta Advocate for the respondent

ORDER

1. A complaint dated 04.01.2019 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Ms. Varsha Jain and Mr. Kirti Pradeep Jain, against the promoter M/s Magic

Eye Developers Pvt. Ltd. and M/s Spire Developers Pvt. Ltd., on account of violation of clause 9.1 of buyer's agreement executed on 25.02.2013 in respect of unit described as below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the buyer's agreement has been executed on 25.02.2013 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for noncompliance of contractual obligation on the part of the promoters/respondents in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016
3. The particulars of the complaint are as under: -

1.	Name and location of the project	"The Plaza at 106", Sector 106, Gurugram, Haryana.
2.	Project area	3.725 acres
3.	Nature of project	Commercial colony
4.	Registered/not registered	Registered
5.	HARERA registration no.	72 of 2017
6.	HARERA registration valid upto	31.12.2021
7.	DTCP license no.	65 of 2012

8.	Date of execution of buyer's agreement	25.02.2013
9.	Provisional allotment letter dated	24.07.2012
10.	Unit no.	0304, tower A2, Block no. 04, 3 rd floor
11.	Unit measuring	1000 sq. ft.
12.	Payment plan	Construction linked payment plan
13.	Total consideration amount	Rs.- 47,50,000/- (BSP)(as per agreement)
14.	Total amount paid by the complainant	Rs. 50,68,084/- (as per receipt annexed with the file)
15.	Date of delivery of possession as per clause 9.1 of buyer's agreement i.e. 3 years from the execution of buyer's agreement + grace period of 6 months)	25.08.2016
16.	Delay in handing over possession till date	2 years 6 month approx

4. Details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondents. A buyer's agreement dated 25.02.2013 is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 25.08.2016. Neither the respondent has delivered the possession of the said unit as on date to the complainants nor they have paid any compensation as per the buyer's

agreement. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through his counsel appeared on 19.03.2019. The case came up for hearing on 19.03.2019. The reply has been filed on behalf of the respondent and the has been perused.

Facts as per complaint

6. The complainants submitted that the respondent no.1 was the developer of the said site of the project before the amalgamation of the respondent companies and the respondent no.2 is the owner of the land proposed to be developed.
7. The complainants submitted that an amalgamation of the respondent companies took place vide order dated 21.07.2014 passed by the Hon'ble High Court, Delhi. It is submitted that the hon'ble authority ought to consider both the companies as one for the purpose of the adjudication of the present complaint.
8. It is submitted that a number of false representations were made to the complainants herein to allure them into making a

booking for a unit in the project of the respondents. Some of the highlights of the project as presented by the respondents include:

- Commercial space spanning over 70,000 sq. ft.
- Retail space ranging from 250 sq. ft. to 1500 sq. feet
- Easily approachable from prime housing locality
- State of art fire-fighting with emergency alarm
- 24/7 medical and pharmacy, 24x7 café and food court
- Multi tier digital and physical security, communication and business services.

9. It is submitted that the complainants, lured by all the amenities and services of the respondents decided to book a unit in the project of the respondents. That the unit was to be used by the complainants as a service apartment which would support them after retirement and form a means to earn their livelihood. That the respondent further assured the complainants that the unit would be apt for the service apartment because of the various amenities being provided by the respondents. Secondly, the complainants had also been assured of timely delivery of the possession of the unit which led them to make the booking.

10. The complainants submitted that the respondents vide their letter dated 24.07.2012 granted a provisional allotment to the complainants herein, and allotted flat no. 0304, tower no. A2, 3rd floor at basic sale price: Rs.4,750/- per sq. ft.
11. It is submitted that a buyer's agreement was executed between the parties on 25.02.2013. That as per the agreement, the respondents were required to complete the construction of the unit and handover the possession of the same to the complainants within 3 years of the execution of the agreement. That the possession of the completely constructed unit, along with the facilities and the promised amenities was to be handed over to the complainants by 25.02.2016 from the date of execution of the agreement.
12. It is submitted that the respondents till date have failed to complete the construction work at the project site and have thus, failed to deliver the possession of the same to the complainants in conformity with the agreement. That the respondents moreover, have failed to provide any just reason for the delay caused herein and have illegally retained the money of the complainants. That the respondents have failed to complete the project till date and, are not in a position to offer possession to the complainants in the near future.

13. The complainants submitted that they had chosen a construction linked payment plan in the hope that they will only be required to make payments as per the actual construction on the site. Although, in reality the respondents had raised demands without reaching the relevant milestone.
14. The complainants submitted that the respondent has further abused his dominant position in the agreement by levying an exorbitant rate of interest @18% on the delayed payments made by the complainants and has comparatively limited its own liability of paying compensation on delayed possession.
15. The complainants submitted that the clauses regarding compensation and time being essence are unilateral as the respondents have only tried to save themselves from compensating the complainants in case of a delay in completion of the project and paying the appropriate compensation to the complainants. That such clauses tend to shroud the liability of the respondent towards their customers and gives them an arbitrary power to pay a negligible compensation against the indefinite delay being caused by them, in giving the possession to the allottees and simultaneously grabbing their hard-earned money, as the allottee(s) is under a constant fear of being charged at the interest rate of 18% for the delay.

16. The complainants submitted that the said clause is also in clear contravention of the provisions of the Real Estate (Regulation and Development) Act, 2016 which has clarified the position that the interest payable by the promoter in case of default shall be the same as the interest payable by the allottees in case of any default made by them.
17. The complainants submitted that the respondents herein, have also tried to misuse their dominant position in the unilateral agreement by delaying the construction of the project till date and imposing frivolous charges on the complainants towards the said allotment. That the respondents have failed to complete the construction of the project till date. That the construction of the project is way behind the completion stage and the project might take years to complete. That the complainants have been charged an exorbitant amount of Rs.50,68,080/-.
18. The complainants submitted that the respondents served a letter dated 04.11.2014 informing the complainants of the amalgamation of the respondent companies as per the order of the Hon'ble High Court of Delhi dated 21.07.2014. The complainants were further assured that the amalgamation would result into development of the project leading to improved operational efficiency as well as better cost and

resource management. That thinking the amalgamation to be beneficial for speeding the project and improving the quality of construction, the complainants further proceeded with the allotment.

19. The complainants submitted that they had initially visited the site of the project in 2015 when they did not see any major developments. That the complainants had diligently made a payment of Rs.50,68,084/- by 15.10.2015 and had not been updated on the progress of the project after that. It is submitted that no further demand for payment came from the Respondent's side, as no development/construction at the project site was taking place and the project was hopelessly stalled. The internal flooring which was to be completed by the respondent till then was incomplete with no signs of working or completion of the same.

20. The complainants submitted that after a period of 3 years the respondents on 02.11.2018 served a demand notice on the complainants asking them to make a payment of the residual amount to the tune of Rs.3,68,500/-.

21. The complainants submitted that they were shocked to receive the demand notice, as a recent inspection of the site had been made by them which was disappointing. That there was hardly

any labour on site and the construction work was not in full-swing as had been projected by the respondents. That the condition of the project was sufficient to create a strong suspicion in the minds of the complainants as to whether their hard-earned money had been used in the said project or had been used by the respondents for themselves. That the complainants vide their letter dated 13.11.2018 penned all their grievances and further informed the respondents that they had lost all their confidence on the project of the respondents and their willingness to complete the same anytime in the near future. The complainants asked for a refund of the amount deposited by them along with an appropriate rate of interest as both the complainants are senior citizens and had pooled all their resources to pay the respondents. That the complainants have been duped and all their savings have been illegally retained by the respondents.

22. The complainant submitted that there is no sign of basic facilities and amenities in the unit of the complainants which frustrates the very purpose of the booking made by them in the commercial complex. That the complainants had booked a fully furnished service- apartment which was to be used by them as a means of self-employment after retirement. That the complainants herein are senior citizens who had invested all

their savings in order to secure their future. That the malafide actions of the respondents has only resulted in mental and financial hardships to the complainants for which the hon'ble authority is requested to refund the money of the complainants illegally retained by the respondents along with a prescribed rate of interest.

23. The complainant submitted that the unit/apartment cannot be used as a service apartment as it lacks basic facilities and amenities like security. Moreover, the project of the respondent is at a very raw stage and they cannot be expected to complete the construction of the unit in a satisfactory manner anytime soon.
24. The complainant submitted that the complainants till date they have made a payment of Rs.50,68,084/- to the respondents and now seek the intervention of the hon'ble authority to get a refund of the same along with a prescribed rate of interest.
25. It is submitted that the respondent further did not make any demand from the complainants as per the payment plan as they had failed to reach any stage in their construction and are now silent on the aspect of refunding the money of the complainants. That the complainants several times tried to

contact the respondent to obtain information regarding the stage of construction but never received any updates on the same. Moreover, the inspection of the site has resulted in a loss of confidence on the respondents to complete the construction of the unit satisfactorily anytime in the near future. It is submitted that the respondent has only taken money from the complainants and has failed to use the same for the purpose of construction of the project. That the respondents have illegally retained the money of the complainants aggrieved by which the complainants have now been constrained to approach the hon'ble authority for the redressal of their grievances and refund of their hard-earned money.

26. The complainants submitted that they have been diligently paying the instalments as per the demand of the respondent believing that the money was being used to construct the unit. Much to the shock and disappointment of the complainants, their money was being retained by the respondent as they have till date failed to construct the unit and provide any details on the date of possession. That the respondent is liable to refund an amount of Rs.50,68,084/- to the complainants along with a prescribed rate of interest.

27. The complainant submitted that the respondents have moreover, failed to convey any reason for the delay or stage of

construction to the complainants giving them strong reasons to believe that the respondents have been dumping them and retaining their money. Hence, the complainants have lost all their trust in the respondents and have strong reasons to believe that the respondent is not interested in completing the construction of the unit and delivering the unit to the complainants.

28. It is submitted that in above circumstances, it is absolutely just and necessary that this hon'ble authority be pleased to declare that the respondent was bound to deliver the possession of the unit by February 2016. It is submitted that in any case the respondent company is liable to deliver the possession within reasonable time from the booking and the buyer cannot be expected to wait endlessly for the possession. The same has been settled by the Hon'ble Apex Court in the case of the *Fortune Infrastructure and Ors versus Trevor D'Lima and Ors.*

29. **Issues raised by the complainant are as follows:**

- i. Whether there has been failure on the part of the respondent in the delivery of the unit to the complainants within the stipulated time period?
- ii. Whether the complainants are entitled to refund of their money along with interest at the prescribed rate?

Relief sought

30. The complainants are seeking the following reliefs:

- i. Direct the respondents to refund of the entire amount of Rs. 50,68,084/- along with prescribed rate of interest from the date of payment till actual realization of the amount.

Respondent's no. 2 reply:

31. The respondent raised certain preliminary objections and submissions challenging the jurisdiction of this hon'ble authority. The respondent submitted that instant complaint is neither maintainable in law or on facts. The instant complaint is without cause of action and has been filed with malafides. Therefore, instant complaint is not maintainable and is liable to be rejected.

32. The respondent submitted that the buyer's agreement dated 25.02.2013 executed between parties hereto, though is an agreement and parties are bound by it, is not an "agreement for sale" as contemplated in the Act *ibid*. The respondent submitted that as per law laid down by the hon'ble Supreme Court in *Commissioner of Income Tax Vs. Essar Teleholdings*

Limited, 2018 (3) SCC 253, “It is a settled principle of statutory construction that every statute is prima facie prospective unless it is expressly or by necessary implications made to have retrospective operations”. It is submitted that there is no provision in the Act which make it retrospective in operation.

33. The respondent submitted that liability to pay interest by promoter to allottee under Act is a penal liability, which cannot be enforced retrospectively. Promoter should be aware beforehand that if he unable to deliver possession by the date declared by him, he will be liable to pay interest as per provisions of the Act to allottee. it is settled law that penal provisions can never be applicable retrospectively (Ritesh Agarwal Vs. SEBI, 2008(8) SCC 205)

34. The respondent submitted that there is no provision in the Act which affects the agreement executed between the parties prior to the commencement of Act. It is submitted that agreement executed between the parties especially prior to commencement of Act has to be read and interpreted “as it is” without any external aid including without aid of subsequent enactment especially the enactment which do not especially

require its aid to interpret agreements executed prior to commencement of such enactment. Hence, rights and liabilities of the parties including the consequences of default/default of any party have to be governed by buyer's agreement dated 25.02.2013 and not by this Act.

35. The respondent submitted that the date of completion of subject matter project as per section 4(2)(l)(c) is 31.12.2021. The respondent submitted that construction/development works at the project site is going on in full swing as per schedule of construction declared by respondent at the time of taking registration under the Act *ibid*. Present status of construction of building/tower wherein complainant's unit is situated is -"internal and external plaining work, door fixing, electrical work and road construction is going on " is going on. The respondent submitted that they are confident that they will be able to offer possession of complainant's unit much before the above mentioned date of completion declared by it (i.e. 31.12.2021) in its above mentioned declaration under section 4(2)(l)(c).

36. The respondent submitted that this hon'ble authority does not have judicial or quasi judicial power to pass adjudicatory orders in relation to dispute between an allottee and promoter of an ongoing project on the date of commencement of Act especially in circumstances when there is no violation of any declaration given by promoter at the time of getting the ongoing project registered with the authority. It is pertinent to mention that the complainant has committed default in making the payment as per the payment plan agreed by the complainants himself. As per the accounts maintained by the respondent, an amount of Rs. 3,68,500/- is due and payable by the complainant to respondent and with respect to the same an intimation letter dated 02.11.2018 was given to complainant for making the payment of aforesaid amount.

37. The complainants have been at default of making timely payment of instalment despite repeated demands of the respondent. It is to be noted that competition of construction and handover of possession were subject of and depend upon the payment of instalments. The complainant, therefore cannot seek handover of possession when they themselves

have defaulted the payment and accordingly has acted as catalyst is slowing down the pace of construction.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent no.2 and perusal of record on file, the issue wise findings of the authority are as under:

38. With respect to the **first issue** raised by the complainants, as per clause 9.1 of buyer's agreement, the possession of the unit was to be handed over within 3 years from the date of execution of the said agreement along with grace period of 6 months . The buyer's agreement was executed on 25.02.2013. Therefore, the due date of possession comes out to be from 25.08.2016. The clause regarding the possession of the said unit is reproduced below:

"9.1 Schedule for the possession of the said unit

The developer based on its present plans and estimates and subject to all just exceptions/force majeure/statutory prohibitions/court's order etc., contemplates to complete the construction of the said building/said unit within a period of 3 years from the date of execution of this agreement, with two grace periods of 6 months each, unless there is a delay for reasons mentioned in clause 10.1, 10.2 and clause 37 or due to failure of allottee(s) to pay in time the price of the said unit along with the other charges and dues in accordance with the schedule of payments given in Annexure-C or as per the demands raised by the developer from time to time or any failure on part of the

allottee(s) to abide by all or any of the terms or conditions of this agreement.”

With respect to **second issue** raised by the complainants, it is pertinent to note that the project is registered and the revised date of delivery of possession as committed by the respondent is 31.12.2021 and also from the perusal the record it can be seen that the project is almost near completion hence in the interest of justice it is not advisable at this stage to allow the complainants to withdraw from the project. As the promotor is failed to fulfil its obligation as per the terms of agreement and has failed to handover the possession on or before the due date of possession so, the promoter is liable under section 18(1) proviso read with rule 15 to pay delayed possession interest to the complainant, at the prescribed rate i.e. 10.75%, for every month of delay from the due date of possession till the offer of possession.

Findings of the authority

39. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. As per notification no. 1/92/2017-1TCP dated

14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

40. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has decided to observe that the project is registered with the authority. As per registration certificate the revised date of delivery of possession is 31.12.2021.

41. During the proceeding dated 19.03.2019 counsel for the respondent has stated at bar that 90 % work at the project site is complete and they shall deliver the project at the end of year. The complainants have paid Rs.50,68,084/- . By virtue of clause 9.1 of the BBA, respondents were duty bound to hand over the possession to the complainants by 25.08.2016. However the respondent failed in handing over possession by said due date. Further, counsel for the respondent submitted

that complainants are also at default for not making timely payments.

42. Therefore, the authority is of the considered opinion that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, hence the promoter is liable under section 18(1) proviso of the Act *ibid*, to pay to the complainant interest, at the prescribed rate, for every month of delay till the handing over of possession.

43. The complainants have made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. The complainant has further requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

Decision and Direction of Authority

44. After taking into consideration all the material facts produced by the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions in the interest of justice: -

- i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 25.08.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.
 - ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid on or before 10th of every subsequent month.
 - iii. The respondent is also entitled to get interest at prescribed rate of 10.75% per annum on account of not receiving timely payment from the complainants.
45. The order is pronounced.
46. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 19.03.2019

Judgement uploaded on 08.04.2019