

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

**Complaint no. : 110 of 2019**  
**First date of hearing : 28.03.2019**  
**Date of decision : 28.03.2019**

Smt. Sudesh Devi

**R/o : A-58, Police Staff Quarter, Thana  
Janakpuri, West Delhi-58**

**Complainant**

Versus

M/s. Almond Infrabuild Pvt Ltd (Through its  
Managing Director/Directors/Authorized  
Signatory)

**Registered office : 711/92, Deepali, Nehru  
Place, New Delhi-110019**

**Respondent**

**CORAM**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE**

Shri Shashi Kant Sharma Advocate for the complainant

Shri M.K. Dhang Advocate for the respondent

**ORDER**

1. A complaint dated 15.01.2019 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 Smt. Sudesh Devi against the respondent M/s. Almond Infrabuild Pvt Ltd,



for the unit described below in the project “ATS Tourmaline” located at Sector 109, Gurugram being developed by the respondent on account of delay in delivery of possession which is in violation of section 11 (4) (a) of the Act.

2. Since the apartment buyer agreement was issued on 04.01.2014 i.e prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for non-compliance of obligation on the part of the respondents/ complainant, as the case may be under section 34(f) of the Act *ibid*.
3. The particulars of the complaint are as under: -

1.	Name and location of the Project	“ATS Tourmaline” at Sector 109, Gurugram.
2.	Current status of the project	Applied for occupation certificate on 19.03.2018.
3.	Nature of real estate project	Group housing colony
4.	Total area of the project	10.41 acres
5.	DTCP license no.	250 of 2007 50 of 2012
6.	Date of apartment buyer agreement	<b>04.01.2014</b>
7.	Unit no.	5073, tower 5, 7 <sup>th</sup> floor



8.	Measuring area of the allotted unit	2150 sq. ft. (super built up area)
9.	RERA Registration status	Registered
10.	RERA registration no	41 of 2017
11.	Revised date as per RERA registration certificate	23.10.2019 (6 years from the date of environment clearance i.e 23.10.2013)
12.	Due date of delivery of possession (as per clause 6.2 of the apartment buyer agreement : 42 months from the date of this agreement )	<b>04.07.2017</b>
13.	Total consideration (as per schedule IV of the apartment buyer agreement)	Rs. 1,55,96,250/-
14.	Total amount paid by the complainant till date (as per calculation sheet on page 52 of complaint)	Rs. 1,34,00,256/-
15.	Payment plan	Time linked payment plan
16.	Delay in delivery of possession upto 28.03.2019	1 years 8 months 24 days
17.	Penalty (as per clause 6.3 of apartment buyer agreement)	Rs 5/- per sq. ft per month of super area



4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. An apartment buyer agreement dated 04.01.2014 is available on record for the aforesaid unit. But the respondent has failed to deliver

possession by the due date i.e 04.07.2017 thereby failing to fulfil its contractual obligation till date, which is in violation of section 11(4)(a) of the Act *ibid*.

5. Taking cognizance of the complaint, the authority has issued notice to the respondent for filing reply and for appearance. The respondent appeared on 28.03.2019. The case came up for hearing on 28.03.2019. The reply has been filed by the respondent which has been perused by the authority.

#### FACTS OF THE COMPLAINT

6. The complainant submitted that in or around September, 2013, authorized representative of the respondent introduced the project namely "Tourmaline" in Sector 109, village Babupur, Gurgaon. It was represented that the said project envisages the development of 3 bedroom flats for a price 1 crore to 1.7 crore.
7. The complainant along with her husband, had visited at sales office of respondent and discussed the details of the said project, wherein, the respondent has represented, *inter alia*, to the effect that they have already secured all necessary approvals and permissions in respect of the above said project



and is in the process of commencement of the construction soon.

8. The complainant submitted that relying upon promises and assurances given by the respondent, she had booked a residential flat no. 5073 located at 7<sup>th</sup> floor situated in tower no. 05 having super area 2150 sq. ft for a total sale consideration of Rs. 1,55,96,250/- and accordingly she paid a sum of Rs. 10,00,000/- as booking amount on dated 26-09-2013 and opted construction linked plan.
9. The complainant also submitted that thereafter respondent made continuous demands of payment and the complainant paid all instalments within the prescribed period in order to save the cordial relationship.
10. The complainant also submitted that at the time of booking of flat respondent promised and assured to complainant that the construction is going to start very soon. However, complainant astonished to note that the construction has not started even after the lapse of one year of booking, and it reveals that promise and assurance of respondent is fake and vague. However, respondent continue to make demand of further payments from time to time from complainant. However the



complainant made all the payments as per assurance and promise of respondent.

11. The complainant also submitted that on 04-01-2014, the apartment buyer agreement was also executed between respondent and complainant. In the said agreement it was stipulated that the total sale consideration would be Rs.1,55,96,258/- . It was clearly stipulated at the time of booking of the flat that the possession will definitely be awarded within three years from the date of booking but after going through the buyer agreement it was stipulated that the possession of the flat will be handed over to applicant/complainant within a period of 42 months from the execution of builder buyer agreement. Here on this point also respondent has defrauded and cheated complainant.

12. The complainant also submitted that she made timely visits at the project and sorry to note that there is very slow progress in the construction.

13. The complainant also submitted that from December, 2013 to September 2016 there was absolute no progress on the project. On this complainant reminded to respondent as to how will be able to complete the project by the stipulated date,



then respondent told applicant/complainant that the work is being stalled due to non-receipt of certain approvals from the govt. authorities. It is also pertinent to mention here that till September, 2016 complainant has already paid more than 70 % approx. payment against the said flat. It is also specifically submitted that till today complainant has already made the total sum of Rs.1,34,00,256/- (approx.. 90% of the total cost of flat). It is specifically mention here that respondent is in the habit of charging interest @ 18% p.a. on the delayed payment from the customers.

14. The complainant also submitted that according to builder buyer agreement possession of the flat would be delivered by July, 2017. The complainant has already released the payment as per demand raised by the respondent from time to time. The respondent never raised any objection with respect to any delay in payment. As such, the complainant made all the payments timely and there is nothing outstanding against the complainant.

15. The complainant also submitted that it was unanimously agreed by the respondent that the possession would be delivered during July, 2017 but till date no possession has



been delivered. Moreover, it is respectfully submitted that during July 2017 the project was not completed at all and it was under construction.

### **ISSUES TO BE DETERMINED**

16. The relevant issue as per the complaint is as follows :-
- Whether the respondent has delayed the delivery of possession of the booked unit and is liable to pay delay interest for the delay in delivery of possession?

### **RELIEF SOUGHT**

17. The relief sought by the complainant is as follows :
- To direct the respondent to pay delay interest @ 10.75% per annum on the amount already paid by the complainant i.e. Rs.1,34,00,256 /- from the due date of possession i.e July, 2017 till the actual date of delivery of possession. Thereafter to deliver the possession of the booked unit.

### **RESPONDENT'S REPLY:**

18. The respondent submitted that the complaint is neither maintainable nor tenable before this authority and is liable to be out-rightly dismissed. As the apartment buyer agreement was executed between the complainant and the respondent





prior to the enactment of the Real Estate (Regulation and Development) Act, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively.

19. The respondent also submitted that the respondent has filed the present reply within the period of limitation as per the provisions of Real Estate (Regulation and Development) Act, 2016.
20. The respondent also submitted that the complainant is estopped from filing the present complaint by her own acts, omissions, admissions, acquiescence and laches.
21. The respondent also submitted that there is no cause of action to file the present complaint.
22. The respondent also submitted that the complainant has no locus standi to file the present complaint.
23. The respondent also submitted that the complainant has not filed the present complaint before the appropriate forum. The complainant has filed the present complaint in form 'CAO' which can be filed only before the adjudicating officer and not before this authority as per rule 29(1) of the Haryana Real Estate (Regulation and Development) Rules, 2017.



24. The respondent also submitted that this authority does not have the jurisdiction to decide on the imaginary interest as claimed by the complainant. It is submitted that in accordance with section 71 of the Real Estate Regulatory Authority Act read with rule 21(4) and 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, the authority shall appoint an adjudicating officer for holding an inquiry in the prescribed manner after giving any person concerned a reasonable opportunity of being heard. It is submitted that even otherwise it is the adjudicating officer as defined in section 2(a) of the Real Estate Regulatory Authority Act who has the power and the authority to decide the claims of the complainant.

25. The respondent submitted that the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute i.e. clause 21.1 and 21.2 of the buyer agreement, which is reproduced for the ready reference of this authority-

*“All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the*



*respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be under the Arbitration and Conciliation Act, 1996 and any statutory amendments/modification thereto by a sole arbitrator who shall be mutually appointed by the Parties or to be mutually appointed or if unable to be mutually appointed, then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties.*

26. The respondent also submitted that the venue of arbitration shall be at Gurgaon and only the courts at Gurgaon shall have the jurisdiction in all matters arising out of this agreement.
27. The respondent also submitted that the complainant has not approached this authority with clean hands and has intentionally suppressed and concealed the material facts in the present complaint. The present complaint has been filed by her maliciously with an ulterior motive and it is nothing but a sheer abuse of the process of law. That the possession of the unit is supposed to be offered to the complainant in accordance with the agreed terms and conditions of the apartment buyer agreement.
28. The respondent also submitted that clause 6.2 of the buyer agreement states that

*“The Developer endeavor to complete the construction of the Apartment within 42 months from the date of this*



*Agreement (Completion Date). The company will send possession notice and offer possession of the Apartment to the Applicant as and when the company receives the occupation certificate from the competent authorities”*

29. The respondent also submitted that as soon as the restraint order dated 23.04.2014 was set aside, the respondent completed the construction of the project and an application was made to the concerned authorities for the grant of occupation certificate vide application dated 19.03.2018. It is submitted that there is no default on the part of the respondent to complete the project and as per clause 6.2 (f) of the apartment buyer agreement, the respondent was entitled to an extension of time from the expiry of the completion date if the construction was delayed on account of a force majeure event.
30. The respondent also submitted that no illegality or wrong has been committed by the respondent. The respondent company shall offer the possession to the complainant subject to her making payment of the outstanding dues as agreed upon by the parties in accordance with the terms and conditions of the apartment buyer agreement as well on receipt of the occupation certificate to be issued by the concerned authorities.



**DETERMINATION OF ISSUES:**

31. As regards the **sole issue**, as per clause 6.2 of the apartment buyer agreement dated 04.01.2014, the possession of the unit was to be handed over within 42 months from the date of execution of agreement. In the present case, the flat buyer's agreement was executed on 04.01.2014. Therefore, the due date of handing over the possession shall be computed from 04.01.2014. Accordingly, the due date of possession was 04.07.2017 and hence, the period of delay in delivery of possession is computed as 1 year 8 months 24 days till the date of decision. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of super area for any delay in offering possession of the unit as per clause 6.3 of apartment buyer agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided. It has also been observed in para 181 of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)***, wherein the Bombay HC bench held that:

*"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual*



*purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”*

32. The possession of the apartment was to be delivered by 04.07.2017, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession. Therefore, as per section 18(1) proviso read with rule 15 of the Rules *ibid*, the complainant is entitled to prescribed rate of interest i.e. State Bank of India highest marginal cost of lending rate plus two percent, per annum.

#### **FINDINGS OF THE AUTHORITY:**

32. 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 complainant 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.

33. In the present case, the authority has observed that the project in question is registered with the authority. Occupation certificate has not been received by the respondent so far. As per clause 6.1 of the apartment buyer agreement dated 04.01.2014 for unit no. 5073, 7<sup>th</sup> floor, in the project "ATS Tourmaline, Sector-109, Gurugram, possession was to be handed over to the complainant within a period of 42 months from the date of execution of apartment buyer agreement which comes out to be 04.07.2017. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.1,34,00,256/- to the respondent against a total sale consideration of Rs.1,55,96,250/-.



**DECISION AND DIRECTIONS OF THE AUTHORITY:**

29. 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 issue the following directions

- i. The complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 04.07.2017 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 before 10<sup>th</sup> of subsequent month.
- iii. The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.

30. The order is pronounced.

31. Case file be consigned to the registry.



**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated : 28.03.2019

Judgement uploaded on 17.04.2019