

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

Complaint no. : 1731 of 2018

First date of hearing 12.02.2019

Date of decision : 28.03.2019

Nitin Bhayana,
57, Sunder Nagar,
Mathura Road,
New Delhi-110003.

Complainant

Versus

1. M/s Chintels India Ltd.
A-11, Kailash Colony,
New Delhi -110048.
2. Prashant Solomon,
Managing Director
A-11, Kailash Colony,
New Delhi -110048.
3. Ashok Solomon, Whole time Director;
A-11, Kailash Colony,
New Delhi -110048.
4. Rohan Solomon, Director;
A-11, Kailash Colony,
New Delhi -110048
5. Satyashiva Prasad Nedury Venkata
Narshima Sasha,
Director;
A-11, Kailash Colony,
New Delhi -110048.
6. Ajit Nath Jha – Director
A-11, Kailash Colony,
New Delhi -110048.

Respondents

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Ms. Shweta proxy counsel for Advocate for the complainant
Shri Kamal Taneja
Shri Sanjay Kumar Kaushik Advocate for the respondent

ORDER

1. A complaint dated 14.11.2018 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 Mr. Nitin Bhayana against the promoter, M/s. Chintels India Ltd. and others on account of violation of the clause 11 of the apartment buyer agreement executed on 15.05.2012 in respect of flat described below in the project 'Chintels Paradiso' 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 apartment buyer agreement has been executed on 15.05.2012, 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 non-compliance of statutory obligations on the part of the promoter/respondent 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	Chintels Paradiso, Sector 109, Gurugram
2.	Nature of project	Residential group housing colony
3.	Project area	12.306 acres
4.	DTCP license no	251 dated 02.11.2007 09 dated 17.01.2008
5.	Registered/Unregistered	Not registered
6.	Payment plan	Construction linked
7.	Allotment letter	03.05.2012
8.	Date of apartment buyer agreement	15.05.2012
9.	Unit no.	H-904, 9 th floor, tower H
10.	Area of unit	2630 sq. ft.
11.	Total consideration as per apartment buyer agreement	Rs. 1,18,87,750/-
12.	Total amount paid by the complainant as alleged by the him	Rs. 1,14,85,827/-

13.	Date of actual start of construction tower in which allotment is made	01.04.2011
14.	Due date of delivery of possession as per clause 11 of apartment buyer agreement – 36 months with grace period of 6 months from the date of actual start of construction of tower in which allotment is made	01.10.2014
15.	Penalty as per clause 12 of the apartment buyer agreement	Rs. 5 per sq. ft. of super area per month
16.	Delay till offer of possession	2 years 8 months 21 days
17.	Offer of possession	22.06.2017
18.	Occupation certificate	18.08.2016

4. 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 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 01.10.2014. Neither the respondent has delivered the possession of the said unit till date to the complainant nor they have paid any compensation @ Rs.5/- per sq. ft. per month for the period of delay as per clause 12

of flat buyer's agreement dated 15.05.2012. 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 appearance. The case came up for hearing on 12.02.2019. The respondent appeared on 12.02.2019, 28.03.2019. The reply filed on behalf of the respondent on has been perused.

FACTS OF THE CASE:

6. The respondent submitted that the respondent no.1 company i.e. Chintels India Ltd. is a private limited company incorporated under the Companies Act, 1956, presently having its registered office at A-11, Kailash Colony, New Delhi 110048. The respondent is the promoter of the project defined under Section 2(zk) of the Real Estate (Regulation and Development) Act, 2016.
7. The respondent no. 2, 3, 4, 5, 6 are the persons who are the directors/promoters of the respondent no. 1 company and were, at the time the offence detailed in the complaint were committed, in charge and were responsible to the respondent

no. 1 company for the conduct of the business of the respondent no. 1 company and therefore the said persons as well as the respondent no. 1 company are guilty of the commission of the offences under the Act and Rules framed thereunder and are therefore liable to be proceeded against the punished accordingly.

8. The offences have been committed by the various respondents and their unknown associates in a well-planned and duly concerted conspiracy and in collusion with each other and therefore it is respectfully submitted that, as per the provisions of the RERA Act, 2016 and the rules framed thereunder the liability of all the respondents are joint and severally therefore they have been made party to the current complaint so that they may be penalized as per law for their role in the fraud committed upon the complainant.

9. The complainant submitted that in the month of January 2012 one of the executives of the respondent company approached the complainant with a proposal of offering sale of a residential apartment in the residential housing project called "Chintels Paradiso" being developed by the respondent

company. The said executive emphasized to the complainant that it was a good investment opportunity and that the complainant should definitely invest in the same. The said executive showed brochure containing various layout plans and drawings and investments/payments charts to impress the complainant.

10. Based upon the representations of the executive of the respondent company, the complainant agreed to apply in the said housing project vide application no. CIL/PARADISO/0406 dated 21.01.2012 and purchased one apartment therein considering their need of residential apartment in coming days as future planning for their family.
11. The complainant booked a residential apartment no. H-904 in residential group housing project known as "Chintels Paradiso" situated at Sector -109, Gurgaon, Haryana. The complainant was allotted a residential apartment no. H-904 by the respondent company vide its allotment letter dated 3.05.2012. Thereafter, the parties i.e. the complainant and the respondent company, entered into an apartment buyer agreement dated 15.05.2012, where the total sale

consideration of the apartment was Rs. 1,18,87,750/- plus taxes. The complainant opted for a construction linked payment plan.

12. The complainant without a default had paid a sum of Rs. 1,14,85,827/- towards the purchase of the residential apartment to the respondent company.

13. The complainant submitted that it would not be out of context to mention herein that the said apartment buyer agreement was a standard format agreement draft received from the builder/respondent company and the complainant had no choice but to sign the same as it is without having any say for negotiation on numerous one sided clause titled more in favor of the builder/respondent company and against the interest of the complainant.

14. The complainant submitted that at the time of execution of the apartment buyer agreement dated 15.05.2012, the respondent company in terms of the clause 11 of the agreement, promised to deliver the apartment in question, to the complainant within a period of 36 months plus a grace

period of 6 months from the date of actual start of the construction of a particular tower building in which the registration of allotment is made. As in the instant case, the respondent company started construction of tower 'H' on 1.04.2011 after the site was excavated. Therefore, in terms of clause 11 of the agreement plus a grace period of 6 months, the respondent company was to deliver the possession of the apartment in question to the complainant latest by 1.10.2014. But the respondent company has failed to deliver the possession of the apartment in question to the complainant within the stipulated time period under the apartment buyer agreement dated 15.05.2012.

15. The complainant has availed a housing loan from HDFC Bank and have regularly paid all the amounts as and when demanded by the respondent company towards the sale consideration of the apartment in question.
16. The respondent company through its directors/promoters played a calculated fraud upon the complainant by obtaining almost 95% of the consideration amount for the apartment in question and by not giving the possession of the apartment in

question to the complainant within the stipulated time period.

17. The respondent company did not offer possession of the apartment in question to the complainant within the stipulated time period in terms of clause 11 of the apartment buyer agreement dated 15.05.2012. Moreover, no explanation has been given by the respondent company to the complainant as to why they did not offer the possession within the stipulated time period, though the complainant had paid more than 95% of the amount to the respondent company. The respondent company being the builder are enjoying the substantial amount of consideration paid by the complainant. On the other hand, the complainant after having paid the substantial amount of money is still empty handed.
18. The complainant somewhere around May 2016 received a letter from the respondent company stating that they have applied for the occupation certificate and the same is expected very shortly.

19. It is evident from the above mentioned letters of the respondent company that till May 2016 almost after 2 years from the date of stipulated time period, the respondent company had not even applied for the occupation certificate, forget about the offer of possession.
20. The complainant has time and again inquired about the possession of his apartment by writing e-mails to the respondent company. One such instance being e-mail dated 20.06.2017 written by the complainant to the respondent company requesting for offer of possession and a statement of account from the respondent company vide the said e-mail the complainant further showed his willingness to clear the outstanding amount and take the possession of the apartment in question.
21. The respondent company after a period of almost 3 years from the date of stipulated time period for the very first time offered the possession of the apartment in question to the complainant vide its letter dated 22.06.2017.

22. The complainant after the offer of possession by the respondent company visited the project and was shocked to observe that all the amenities and facilities as promised at the time of execution of the apartment buyer agreement are missing and have not been even started despite the complainant having been paid almost 95% of the total consideration amount. It is stated that the offer of possession is just a paper possession without there been any amenities and facilities.

23. The complainant submitted that under section 18 of the Real Estate (Regulation and Development) Act, 2016 the complainant is entitled to seek refund of the full amount paid along with interest/possession of the apartment in question along with compensation if the project is not complete and the promoter fails to give possession. It is stated that till date the respondent company has failed to give possession to the complainant even after the complainant repeatedly asking for the same.

ISSUES RAISED BY THE COMPLAINANT:

24. The following issues are relevant which have been raised by the complainant:

- a. Whether respondents have failed to deliver the physical possession of the apartment in question to the complainant within the stipulated time period?
- b. Whether respondent no.1 has a valid occupancy certificate for the said project?

RELIEF SOUGHT BY THE COMPLAINANT:

25. In view of the facts mentioned the following reliefs have been sought by the complainant:

- a. Issue appropriate directions to the respondents to immediately hand over the possession of the apartment in question to the complainant.
- b. Direct the respondents to pay entire paid amount by the complainant along with prescribed rate from the date of respective deposit.

REPLY BY THE RESPONDENT:

26. The respondent submitted that the present complaint is liable to be dismissed as the complainant has not approached this hon'ble tribunal with clean hands and has suppressed true and material facts from the hon'ble tribunal. The complainant has suppressed the fact that he is the director of the company which carried on the construction activities at the Chintels Paradiso site and due to slow and poor construction workmanship of the complainant company the project got delayed. The complainant further did not bring into the notice of this hon'ble tribunal that he had been allotted the said unit at discounted price as he was the director of M/S Bhayana Builder Pvt. Ltd. He further did not bring to the notice of the hon'ble tribunal the fact that a arbitrational dispute is going on between the complainant company and the answering respondent. It is pertinent to mention here that the delay in the handover of the project was mainly due to non completion of project by the complainant company.

27. The respondent submitted that with due respect it is submitted the hon'ble tribunal does not have jurisdiction to

adjudicate the present complaint as the respondent company had already obtained the occupancy certificate with regard to the unit in dispute on 18.08.2016. Hence, the project Chintels Paradiso did not require a registration under The Real Estate (Regulation and Development) Act, 2016. Thus the provisions of RERA are not applicable on the Project Chintels Paradiso.

28. The respondent submitted that vide letter dated 22.06.2017 the answering respondent offered possession of apartment no. H-904 to the complainant but the complainant did not come forward to take the possession of aforementioned unit. Vide email dated 30.08.2017 the answering respondent duly informed the complainant that he is eligible for compensation of Rs 1,70,896/-. Further on 05.08.2017 it informed the complainant that it has calculated the compensation amount after adjusting the interest amount.

29. The respondent submitted that clause 30 of the apartment buyer agreement provides the process for settlement of disputes and arbitration. Hence in view of clause 30 the present complaint is liable to be dismissed.

30. The respondent denied that the said apartment buyer agreement was a standard format agreement draft received from the builder/respondent complainant and the complainant had no choice but to sign the same as it is without having any say for negotiation numerous one sided clause title more in favor of the builder/respondent company and against the interest of the complainant. It is pertinent to mention here that the answering respondent had handed over the apartment buyer agreement to the complainant and after going through the same the complainant executed the same and till date has not raised any concern with regard to any terms and conditions of the said agreement.

31. The respondent submitted that so far as terms and conditions of the apartment buyer agreement is concerned it is matter of record, hence it needs no reply. The respondent denied that the project is lacking most of the facilities and amenities promised by the respondent company to the complainant at the time of execution of the agreement. The respondent submitted that the answering

respondent has provided all the promised amenities. he respondent further submitted that the complainant is aware of this fact that all the amenities have been provided at the project.

DETERMINATION OF ISSUES:

32. After considering the facts submitted by the complainant, reply by the respondents and perusal of record on file, the issue wise

- i. With respect to the **first issue** raised by the complainant, the authority came across that as per clause 11 of the apartment buyer's agreement; the possession of the said apartment was to be handed over within 36 months' years plus grace period of 6 months from the date of actual start of construction of tower in which allotment is made. Date of actual start of construction of tower in which allotment is made started on 01.04.2011. Therefore, the due date of possession shall be computed from 01.04.2011. The clause regarding the possession of the said unit is reproduced below:

“Clause 11:

...the possession of the said apartment is proposed to be delivered by the company to the allottee within 36 months with a grace period of six months from the date of actual start of construction of particular tower in which the allotment is made...”

Accordingly, the due date of possession was 01.10.2014 and the possession has been delayed by approximately 2 years 8 months 21 days till offer of possession i.e. 22.06.2017 . Thus the complainant is entitled for interest on the delayed possession at the prescribed rate under the Act *ibid*. Delay charges will accrue from the due date of possession i.e. 01.10.2014 till the offer of possession. i.e. 22.06.2017. The complainant is thus bound to take possession of the said unit after clearing dues, if any.

- ii. With respect to the **second issue**, it is noted that the respondent has obtained an occupation certificate dated 18.08.2016. Thus this issue is decided in affirmative.

FINDINGS OF THE AUTHORITY:

33. **Jurisdiction of the authority-** The project “Chintels Paradiso” is located in sector 109 Gurugram, thus the authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as held in ***Simmi Sikka v/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

34. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter. The complainant requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions and fulfil obligation.
35. The authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.
36. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a

consumer. This view has been upheld by the Supreme Court - in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.

37. As per clause 11 of the apartment buyer agreement dated 15.05.2012 for unit no H 904, 9th floor, tower H in the project Chintels Paradiso, sector 109, Gurugram, possession was to be handed over to the complainant within a period of 36 months from date of start of construction of tower H i.e. 01.04.2011 as submitted by the respondent in his reply plus grace period of 6 months which comes out to be 01.10.2014. However, the respondent has not delivered the unit in time. Complainant has already paid Rs. 1,14,85,827/- to the respondent against a total sale consideration of Rs. 1,18,87,750/-. Respondent has already offered the possession of the unit to the complainant on 22.06.2017.

DECISION AND DIRECTIONS OF THE AUTHORITY:

38. After taking into consideration all the material facts adduced by both 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:

- a. The respondent is directed to pay the interest at the prescribed rate i.e. 10.75% per annum for every month of delay in handing over the possession on the amount paid by the complainant.
- b. The respondent is directed to pay interest accrued from 01.10.2014 to 22.06.2017 on account of delay in handing over of possession to the complainant within 90 days from the date of order.

39. The order is pronounced.

40. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date:28.03.2019

Judgement uploaded on 18.04.2019