

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 2161 of 2018

First date of hearing:	23.04.2019
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Date of decision : 30.05.2019

Sanjeeb Kumar Mahapatra R/o. 400/1, SF, Prem Nagar, Gurugram, Haryana -122001

....Complainant

Versus

M/s. Apex Buildwell Pvt. Ltd. (Through its Directors – Mr. Arun Kapoor, Mr. Dwarika Prasad Jaisawal, Mr. Hemant Sharma and Mr. Manoj Kumar) Regd. Office: 14A/36, WEA, Karol Bagh, New Delhi-110005.

....Respondent

CORAM:

Shri Samir Kumar Shri Subhash Chander Kush Member Member

APPEARANCE:

Complainant in person with Shri Ishaan Mukherjee

Shri Sandeep Choudhary

Advocate for complainant Advocate for respondent



ORDER

- A complaint dated 27.12.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Sanjeeb Kumar Mahapatra against the promoter M/s Apex Buildwell Pvt. Ltd., through its Directors in respect of apartment described below in the project 'OUR HOMES' on account of violation of the clause 3(a) of apartment buyer's agreement executed on 17.03.2017 in respect of apartment described below for not handing over possession by the due date 02.06.2017.
- 2. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016. Hence, keeping in view the facts of the case and submissions made by both the parties, the authority has decided to treat this complaint as an application to issue directions for compliance of obligations by the promoters under section 34(f) of the Real Estate (Regulation and Development) Act, 2016.



3. The particulars of the complaint are as under: -

- Nature of the project- affordable group housing
- DTCP License no.- 13 of 2012 dated 22.02.2012
- License valid/renewed up to- License renewed upto

01.12.2019

1.Name and location of the project"Our Homes" Gadoli Khurd, Sector-37C, Gurgoun2.Nature of the projectLow cost/affordable group housing3.DTCP license no.13 of 2012(22.02.2012)4.Revised building plan07.05.20135.Registered/ not registeredRegistration pending(applied on 29.05.2019)6.Project area10.144 acres7.Flat/apartment/unit no.238 on 2nd floor in block/tower Lotus8.Apartment/unit measuring48 sq. mtrs.9.Date of execution of apartment buyer's agreement17.03.201710.Payment PlanConstruction Linked Plan11.Total consideration amount as per apartment buyer's agreement clause 1.2 dated 17.03.2017Rs.16,000,00/-12.Total amount paid by theRs.14,37,625/-			
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apartment buyer's agreement clause 1.2 dated 17.03.2017 Rs.16,000,00/-	10.	Payment Plan	
12. Total amount paid by the Rs.14,37,625/-	11.	apartment buyer's agreement clause	Rs.16,000,00/-
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	Complainant as per intimation of due instalment dated 01.05.2017 (page no.52)	
13.	Consent to establish granted on(as per similar cases)	02.12.2013
14.	Due date of delivery of possession as per clause 3(a) of apartment buyer's agreement i.e. within a period of 36 months+ 6 months grace period from the date of commencement of construction upon receipt of all approvals	02.06.2017
15.	Delay in handing over possession till date of decision	1 year 11 months 28 days

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. The apartment buyer's agreement dated 17.03.2017 is available on record for the aforesaid apartment according to which the possession of the said unit is to be delivered by 02.06.2017. The complainant is alleging that the construction activity is going at slow pace and stated that the quality of the construction done by the promoter is of low quality and there is no possibility of getting the possession of the unit in question by the committed date,



which is an obligation of the promoter under section 11(4)(a) of the Act ibid.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent through its counsel appeared on 23.04.2019. The case came up for hearing on 23.04.2019. The reply has been filed by the respondent on 13.02.2019 which has been perused. The respondent has supplied the details and status of the project along with the reply.

Facts of the complaint:

- 6. The complainant submitted that the respondent is a company and working in field of construction and development of residential and commercial projects in Gurugram in the name of M/s Apex Buildwell Pvt. Ltd.
- 7. The complainant submitted that the respondent company is being developing its project namely "Our Homes" situated at village Garauli-Khurd, Sector-37C, Gurugram. The respondent advertise itself as a very ethical business group that lives onto



its commitments in delivering its housing projects as per promised quality standards and agreed timelines.

- 8. The complainant submitted that being relying upon the advertisement of the respondent, the complainant had applied in affordable housing project under govt. of Haryana Affordable housing scheme and thus allotted apartment no.238, 2nd floor, lotus having a carpet area of approximately 48 sq.mt.
- 9. The complainant submitted that as per the apartment buyer's agreement, the respondent had promise the complainant to handover the physical possession of the dwelling apartment/unit within a period of thirty six(36) months, with a grace period of 6 months.
- 10. The complainant submitted that the respondent by providing false and fabricated advertisements, thereby, concealing true and material facts about the status of project and mandatory regulatory compliances, wrongfully induced the complainant to deposit his hard earned money in their so called upcoming project, with sole dishonest intention to cheat them and cause



wrongful loss to them and in this process the respondent gained wrongfully, which is purely a criminal act.

- 11. The complainant submitted that he is also concerned about the construction quality as when we had checked the internal wall plaster of my allotted unit, its sand is came to my hand and it seems that it was not mixed with the right proportion of cement. So, we request here, that some concerned authority who issued license to the builder (under this government affordable housing project), should be accountable and have some mechanism to check the basic construction quality at this stage at least.
- 12. The complainant submitted that thereafter, has tried his level best to reach the representative of respondent to seek a satisfactory reply in respect of the said dwelling unit but all in vein. The complainant had also informed the respondent about his financial hardship of paying monthly rent and extra interest on his home loan due to delay in getting possession of the said unit.
- 13. The complainant submitted that some buyer of this project have filed complaint about this delay in CM Window and one

of the complaint has been forwarded to DTP Office, sec-14, Gurugram. On the request of home buyers, Mr. R.S. Batt visited the site long with ATP Mr. Manish on 15.01.2018 and at that point we came to know that Builder license has been expired and not renewed. This is respondent 's responsibility to chase for license renewal before a sufficient time of expiry and moreover chase with regular follow up till its renewed.

14. The complainant alleged that as against the total consideration of Rs. 16,00,000/-,the complainant has made total payment of Rs.12,80,000/- on various dates as per payment schedule. He approached the respondent company time and again, but the respondent company has failed to respond to the complainant's queries nor have delivered the possession of the said apartment. Further, the complainant has stated that the quality of the construction done by the promoter is of low quality. The sand of the internal walls plaster came out when the complainant touched it, which shows that the intention of the respondent is only to collect money and spend as low as possible on the construction. Since the respondent has not delivered the possession of the apartment, the complainant



has been suffering economic loss along with other sufferings. Hence, the complainant has filed the present complaint.

15. Issues raised by the complainant:-

- i. Whether the respondent has delayed in handing over the possession of the unit to the complainant?
- ii. Whether the quality of construction/building material is of low quality due to which by touching the wall plaster its sand comes in hand?
- iii. Whether there is a long delay, now respondent should complete the project as per his latest commitment on affidavit in his reply to DTP, Gurugram in which completion of the entire project is mentioned as 31 December 2018 and should pay interest @18% for the delayed period?

Reliefs sought:-

 Interest charged by the builder @ 18% p.a. on delayed payment therefore respondent should pay as per below details-



- a) Respondent should pay same interest 18% p.a. which he charged from consumer as per rolling interest @ 18% per annum for delay which has to be calculated as and when the thirty six months was completed and thereafter the grace period was exhausted.
- b) Direct the respondent to deliver the apartment in the most efficacious and time bound manner.
- c) Pass any other relief(s), which the Hon'ble authority may deems fit and proper be also granted in favour of the complainant and against the respondent.

Respondent's reply:-

- 15.The respondent submitted that the complaint filed is nothing but a gross abuse of the process of law and based on falsehood and concealment of true facts of the case and is neither tenable nor maintainable as filed and liable to be dismissed with heavy costs.
- 16.The respondent submitted that the reliefs prayed for in the complaint are not tenable and cannot be granted as this Hon'ble Authority lacks jurisdiction in the present matter and



hence the present complaint filed under Rule 28 being non maintainable is liable to be rejected/dismissed right-away.

17. The respondent submitted that the complainant does not have any real cause of action to pursue the present complaint and the complainant has filed the present complaint only to harass the respondent builder and gain wrongfully. More so the complainant with open eyes and seeing the advance stage of construction had booked the flat only on 17.03.2017 as stated in the complaint in para 7 and the period of 36 months is yet to be over and therefore, the complaint is a premature one and the complainant is himself estopped in filing the present complaint. That the complainant and his associates finding a good opportunity to harass and extort money from the respondent as the license for the project is under the process of renewal are illegally entering into a conspiracy of defaming and harassing the respondent builder for wrongful gains by every possible manner and are even disturbing the construction at the site by illegally intimidating the staff there whereas the respondent is very much committed in delivering the possession of the project. And the complainant is estopped



in filing the present complaint as per the Apartment Buyer's Agreement executed with the parties.

- 18. The respondent submitted that the respondent company is very much committed to develop the real estate project named Our Home located at Sector 37 C, Gurugram. And the construction work of the same is on full swing and as on date the construction the status is as under:
 - i) Civil Structure : Complete
 - ii) Internal Plaster : Complete
 - iii) White Wash : Under Process
 - iv) Floorings : Under process 68 % complete
 v) Electric fittings : Under process 70% complete
 And the respondent subject to other causes beyond its control
 is quite scheduled to deliver the possession of the first phase
 of the project in within 4 months from the renewal of the
 license which comprises 432 flats in 10 towers and the
 complete delivery in 2nd phase in another 6 months which
 comprises the 16 towers having 704 flats.
- 19. The respondent submitted that though the said project is going behind schedule of delivery, however the respondent have



throughout conducted the business in a bona fide manner and are committed to complete the project and deliver the possession to the customers and the delay is neither intentional nor deliberate but beyond the control of the respondent & due to extraneous circumstances and the respondent does not stand to gain anything from the delay so occasioned rather it is an added cost to the respondent.

20. The respondent submitted that the delay so occasioned is very much beyond the control of the respondent and is explainable & extendable as per the provisions of Clause 3(b)(i) & (ii) of the Apartment Buyer's Agreement and the complainant is estopped from filing the present complaint. Firstly, the respondent could get the Consent to establish from HSPCB only on 2.12.2013 due to which the construction could not be started and once the receiving the same the respondent company have duly carried out the construction work. That thereafter, there had been labour and material shortages affecting the industry as a whole, there had been repeated stoppages to construction activity by the orders of the National Green Tribunal. That given the above factors the License



bearing No. 13 of 2012 got expired on 22.02.2016 i.e. within the agreed time frame of 36 months of completion of construction from start, however, the respondent company being duty bound and committed to the project had filed an application for renewal of application way back on 11.02.2016 along with the renewal fees of Rs. 10,00,000/-. However, due to policy issues the License could not be renewed so far. And further due to the non-renewal of the License the application for registration with the Hon'ble Haryana Real Estate Regulatory Authority could not be allowed and the application of the respondent was rejected. Given such rejection of the RERA registration the bankers are also not allowing the smooth finances and the respondent company had to suffer further but in any case the respondent company is not letting such issues come in way to deliver the project.

21. The respondent submitted that as per Clause 3 of the Builder Buyer's Agreement executed with the complainant, it was agreed between the parties that the respondent shall hand over the possession of the apartment within 36 months with a grace period of six months from the date of commencement of



construction of the complex upon the receipt of all project related approvals including sanction of building plan/revised building plan and approval of all concerned authorities including the Fire service Department, similar vision department, traffic department, pollution control Department etc., as may be required for commencing carrying on and completing the said complex subject to force majeure, restraints of restrictions from any code/authorities. Further as per sub – clause b) of the Clause 3 it was agreed between the parties that the date of the possession shall get extended in the following situation:

i. The completion of the said low-cost/affordable group housing project including the apartment is delayed by reason of non-availability of steel and/or cement or other building materials, or water supply or electric power or slow down, strike or, lock out or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or due to circumstances beyond the power and control of the developer or due to any act, notice, order, rule or modification of the government



and/or any other public or competent authority or due to delaving sanction of anv revised building/zoning plans/grant of occupation certificate or for any other reason beyond the control of the developer, then the apartment allottees agrees that the developer shall be entitled to extension of time for offering the possession of the said apartment. The developer as a result of such contingency arising reserves the right to alter or vary the terms and conditions of this agreement or if the circumstances beyond the control of the developer so warrant, the developer may suspend the construction of the low-cost/affordable group housing project and the agreement for such period as it may consider expedient and the apartment allottees agrees not to claim compensation of any nature whatsoever for the period of suspension of the construction of the lowcost/affordable group housing project and the agreement.

ii. If as a result of any law that may be passed by any legislature or rule, or regulation or order on notification that may be made and/or issued by the government or any other authority including a minuscule authority or on account of



delay in sanctioning of plans or any other sanction or approval for development or issuance of occupation certificate by appropriate authorities, the developer is not in a position to hand over the possession of the apartment then the developer may, if so advised though not bound to do so at its sole discretion challenge the validity, applicability and/or efficacy of such legislation, rule, order or notification by moving the appropriate Courts, Tribunals and/or authorities. In such a situation, the money(ies) paid by the Apartment Allottee(s) in pursuance of this agreement, shall continue to remain with the developer and the apartment allottee(s) agrees not to move for or to obtain specific performance of the terms of this agreement, it being specifically agreed that this agreement shall remain in abevance finally determination by the and court(s)/tribunal/authorities. However the apartment allottees may if he/she so desires become a party along with the developer insist litigation to protect the rights of apartment allottees arising under the agreement.

22. The respondent submitted that it is submitted that the complete real estate industry is under pressure of delivery and the availability of skilled manpower and material is at its all-time low and thereby, the respondent cannot be penalised for the delay being occasioned. In any case the respondent company does not gain anything by delaying the project and is rather committed to deliver the project in the best standards of quality and performance. On the other is hand even the respondent company due to the uncontrollable delay in the delivery of the project is suffering because it has to pay the huge licence fees as for renewal of licenses and other plans. More so it is quite evident that the price of the flats in the project had already been fixed in the year 2009 as per the policy on the basis of estimated costs but the costs of men and material has only increased manifold and the respondent company is suffering immense loss of margins due to the delay so occasioned without there being any compensation to the respondent company. More so the respondent company had to pay higher renewal charges as per the higher EDC charges due to the uncontrollable delays. Thereby, the suffering of the



respondent company are manifold and the developer margins are shrinking on every account and on the other hand the complainant taking advantage of the precarious situation of the respondent company has filed the present complaint to harass the respondent company and to gain wrongfully and avoid interest payments against the amounts outstanding. However, against the odds the respondent company is duty bound to deliver the project very soon.

Determination of issues:-

- 16. After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:
- 17. With respect to **first issue** raised by the complainant, as per clause 3(a) of apartment buyer's agreement dated 17.03.2017, the possession of the flat was to be handed over within 36 months from the date of commencement of construction (with a grace period of 6 months) upon receipt of all project related approvals. In the present case, the consent to establish was granted to the respondent on 2.12.2013. Therefore, the due date of handing over possession will be computed from



consent to establish dated 02.12.2013(taken from similar cases).Clause 3(a) of the apartment buyer's agreement is reproduced below –

"......proposes to hand over the possession of the APARTMENT within a period of thirty six(36) months, with a grace period of 6 months, from the date of commencement of construction of the complex upon the receipt of all project related approvals including the Fire Service Department, Civil Aviation Department, Traffic Department, Pollution Control Department etc., as may be required for commencing, carrying on and completing the said complex subject to force majeure, restrains or restriction form any court/authoritires."

Accordingly, the due date of possession was 02.06.2017 and the possession has been delayed by one year eleven months twenty eight days till date. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. per month of the carpet area of the said apartment as per clause 3(c)(iv) of apartment buyer's agreement is held to be unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided as also held in para 181 of **Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and ors**. (W.P 2737 of 2017), wherein the Bombay HC bench held that:



"...Agreements entered into with individual purchasers were invariably one sided, standardformat agreements prepared bv the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations occupation/completion to obtain certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."

- 18. With respect to second issue raised by the complainant, he has failed to adduce any evidence in support to prove that the quality of construction is allegedly of low and sub-standard. Hence, this issue becomes infructuous for the want of documentary evidence in support.
- 19. With respect to **third issue** raised by the complainant, the complainant has not provided any affidavit in reply to DTP, where the respondent claims the completion of the entire project as 31 December 2018 and also pay the interest @18% for the delayed period(Note: There is no such statement also on behalf of the respondent too). Hence, this issue becomes infructuous for the need to rely on the issue raised by the complainant.

Findings of the authority:

- 18. Jurisdiction of the authority-The authority has complete jurisdiction to decide the complaint in regard to noncompliance 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 Department of Town & Country Planning, 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.
- 19. A plea has been taken by the counsel for the respondent that the respondent has applied for renewal of license and it is expected that renewed licensed will be received within one week and they shall be in a position to apply for OC and after receipt of OC, they shall be offering possession to the



complainant and one month time was given to the respondent to do the needful.

- 20. Since the project is not registered, notice under section 59 of the Real Estate (Regulation & Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.
- 21. Counsel for the respondent has stated that the license no.13 dated 22.02.2012 has been renewed upto 01.12.2019 and copy of renewal of license dated 26.4.2019 has been placed on record. Counsel for the complainant also submitted a copy of application for getting the project registered with the authority. Counsel for the respondent further submitted that the project is ready and the possession is likely to be given within a period of 6 months.
- 22. As per clause 3(a) of the apartment buyer's agreement dated 17.3.2017 for unit no.238, 2nd floor, in project "Our Homes", Sector 37D, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of consent to establish i.e. 02.12.2013 + 6 months grace period which comes out to be 02.06.2017. However, the



respondent has not delivered the unit in time. Complainant has already paid Rs.14,37,625/- to the respondent against a total sale consideration of Rs.16,00,000/-.

Decision and directions of the authority:-

- 23. After taking into consideration all the material facts as adduced and produced 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 to the respondent in the interest of justice and fair play:
 - i. The respondent is duty bound to pay the interest at the prescribed rate i.e. 10.65% for every month of delay from the due date of possession i.e. 02.06.2017 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.
 - ii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iii. The respondent is directed not to charge anything from the complainant which is not part of the apartment buyer's agreement.



- iv. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.65% by the promoter which is the same as is being granted to the complainant in case of delayed possession.
- v. 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 10th of subsequent month.
- 24. The order is pronounced.
- 25. Case file be consigned to the registry.

(Samir Kumar) Member (Subhash Chander Kush) Member

Haryana Real Estate Regulatory Authority, Gurugram Dated: 30.05.2019

Judgement uploaded on 11.06.2019