

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

Complaint no. : 1403 of 2019
First date of hearing: 20.08.2019
Date of decision : 20.08.2019

Ms. Suman Devi
R/o H.No. 160, Sector 30, Gurugram.

Complainant

Versus

M/s Apex Buildwell Pvt. Ltd.
Regd. Office: Plot No. 25 B,
Sector-32, Gurugram.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Sandeep Choudhary

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 28.03.2019 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. Suman Devi, against the promoter M/s Apex Buildwell Pvt. Ltd., on account of violation of the clause 3(a) of the apartment buyer's agreement executed on 12.02.2013 in respect of apartment number 424, 4th floor, block/tower 'Rose' in the project 'Our Homes' for not handing over possession by the due date i.e.



02.06.2017 which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the apartment buyer's agreement dated 12.02.2013 was executed 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 statutory obligation on the part of the respondent in terms of the provision of section 34(f) of the Act *ibid*.

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

1.	Name and location of the project	"Our Homes", Sector 37-C, Gurugram
2.	Project area	10.144 acres
3.	Nature of the project	Affordable group housing colony
4.	DTCP license no.	13 of 2012 dated 22.02.2012
5.	RERA registered/ not registered.	Registered vide no. 40 of 2019 dated 08.07.2019
6.	RERA registration valid up to	31.12.2019
7.	Provisional allotment of unit	23.10.2012
8.	Apartment/unit no.	424 on 4 th floor, block/tower 'Rose'
9.	Apartment measuring	48 sq. mtr. of carpet area
10.	Date of execution of apartment buyer's agreement	12.02.2013
11.	Payment plan	Time linked plan (page no. 43 and 51 of complaint)



12.	Basic sale price as per clause 1.2(a) of apartment buyer's agreement	Rs.16,00,000/-
13.	Total amount paid by the complainant till date	Rs.15,66,968/- (including taxes) (as per receipts annexed at page 42 - 62)
14.	Consent to establish granted on	02.12.2013
15.	Date of delivery of possession as per clause 3(a) of apartment buyer's agreement (36 months + 6 months grace period from the date of commencement of construction upon receipt of all approvals)	02.06.2017 (calculated from consent to establish i.e. 02.12.2013)
16.	Delay in handing over possession till date i.e. 20.08.2019	2 years 2 months 18 days
17.	Penalty clause as per clause 3(c)(iv) of apartment buyer's agreement dated 12.02.2013	Rs.10/- per sq. ft per month of the carpet area of the said apartment for delay.

4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. An apartment buyer's agreement dated 12.02.2013 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 02.06.2017. Neither the respondent has delivered the possession of the said unit as on date to the complainant nor it has paid any compensation as per clause 3(c)(iv) of apartment buyer's agreement dated 12.02.2013. Therefore, the promoter has not fulfilled its 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 20.08.2019. The reply filed on behalf of the respondent on 29.04.2019 has been perused by the authority.

Facts of the complaint

6. The complainant submitted that she booked an apartment admeasuring 48 sq. mtrs. in aforesaid project of the respondent for total sale consideration is Rs.16,00,000/- which includes BSP, car parking, IFMS, club membership, PLC etc. The complainant made payment of Rs.15,66,968/- to the respondent vide different cheques on different dates.
7. The complainant submitted that as per apartment buyer's agreement the respondent had allotted a unit bearing no.424, on 4^h floor, in tower-Rose having carpet area of 48 sq. mtrs, to the complainant. As per para no.3(a) of the apartment buyer's agreement, the respondent had agreed to deliver the possession of the apartment within 36 months from the date of commencement of construction with an extended period of 06 months.
8. The complainant regularly visited the site but was surprised to see that construction work is not in progress and no one was

present at the site to address the queries of the complainant. The only intention of the respondent was to take payments for the project without completing the work. Despite receiving the payment as per demands raised by the respondent for the said apartment and despite repeated requests and reminders over phone calls and personal visits of the complainant, the respondent has failed to deliver the possession of the allotted apartment to the complainant within stipulated period.

9. The complainant submitted that it could be seen that the construction of the project in which the subject apartment was booked with a promise by the respondent to deliver the same by 12.08.2016 but was not completed within time for the reasons best known to the respondent.
10. The complainant submitted that as per clause 3(c)iii of the apartment buyer's agreement dated 12.02.2013 it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainant a compensation @ Rs.10/- per sq. ft. per month of the carpet area of the apartment. It is however, pertinent to mention here that a clause of compensation at such of nominal rate of Rs.10/- per sq. ft. per month for the period of delay is unjust and the respondent has exploited the complainant by not providing the possession of the apartment even after a delay from the agreed possession plan. The

respondent cannot escape the liability merely by mentioning a compensation clause in the agreement.

11. The complainant submitted that on the ground of parity and equity, the respondent should also be subjected to pay the same rate of interest hence the respondent is liable to pay interest on the amount paid by the complainant @18% per annum to be compounded from the promise date of possession till the apartment is actually delivered to the complainant.

Issues raised by the complainants:

12. The following issues are raised by the complainant:
 - i. Whether the agreement is one-sided and unjustified?
 - ii. Whether there is delay in handing over of apartment to the complainant?
 - iii. Whether the interest cost being demanded by the respondent/developer is very higher i.e.18% which is unjustified and not reasonable?

13. Relief sought:

The complainant is seeking the following relief:

- i. To direct the respondent to handover the possession of the apartment along with prescribed interest per annum

from the promised date of delivery till the actual possession of the flat is delivered to complainant.

Respondent's reply

14. 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.
15. The respondent submitted that the reliefs prayed for the in the case pertains only for adjudication of the compensation, therefore, this hon'ble authority lacks jurisdiction in the present matter and only the adjudicating officer appointed under section 71 of the said Act is empowered for the same and hence the present complaint filed under rule 28 being non maintainable is liable to be rejected/dismissed right-away.
16. The respondent submitted that the complainant is estopped to file the present complaint due to her own acts and conduct. The plan chosen and terms agreed between the parties are very much binding on the applicant. The failure to pay the due amounts in a timely manner by so many of the allottees including the complainant have led to multiple problems and extra costs on the respondent leading to further delays. The construction work of the same is on full swing and the

respondent has, pending the issue of renewal of license, even started offer of possession for fit outs in the flats in first phase.

17. The respondent submitted that he is very well committed to the development of the real estate project and the delay being occasioned for delivering the possession of the project is only because of explainable and extendable as per clause 3(b)(i) and (ii) of the apartment buyer's agreement and is due to causes beyond the control of the respondent, therefore the complainant is estopped from filing the present complaint.
18. The respondent submitted that firstly, on grant of license bearing no. 13 of 2012 dated 22.02.2012, the respondent applied for all other relevant permissions and could secure the BRIII for sanction of building plans only on 7.05.2013 and the consent to establish by the office of HSPCB, Panchkula was only granted on 2.12.2013. Since then the respondent is continuing the construction of the project, but to the misery the license so granted expired on 21.02.2016 i.e. prior to the permissible period of construction of 36 months and since 11.02.2016, the respondent is seeking the renewal of the license from the Office of DGTCP, Haryana which is yet to be received despite best efforts of the respondent.

19. The respondent further submitted that the provisions of Real Estate (Regulation and Development) Act, 2016 came into force on 28.07.2017 for which the respondent duly filed an application dated 28.08.2017 and due to lapse of license no. 13 of 2012, the same got dismissed vide orders dated 19.01.2018 leading to further operational obstacles and restrictions of funds in completion of the project.
20. The respondent submitted that since then the respondent is hard trying to avail all the approvals, permissions and sanctions from the relevant authorities. That had the approvals and license be granted in time the respondent, given the speed and efficiency of construction would have duly completed the project within the permissible time period by May 2017. The respondent submitted that it is the respondent who is suffering due to the delay that is being occasioned and has to face extra charges and costs and expenses in getting all the above permissions renewed.
21. The respondent submitted that as per clause 3 of the apartment 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 clause 3(b) of the agreement, 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 delaying sanction of any 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.

- 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.

22. The respondent 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 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 fees for renewal of licenses.

23. The respondent submitted that this honourable forum does not have the subject matter jurisdiction as the respondent have not violated or contravene any of the provisions of the newly promulgated Act or the Rules made thereunder.
24. 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 the delay occasioned had been beyond the control of the respondent, the complainant has no cause of action to file the present complaint as the delay so occasioned is very much due to the factors so contemplated.

Determination of issues:

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

25. With respect to the **all issues** raised by the complainant, the authority came across that as per clause 3(a) of apartment buyer's agreement, the respondent has delayed in handing

over the possession of the said apartment. The relevant clause regarding the possession of the said unit is reproduced below:

“3(a) offer of possession

...the Developer proposes to handover the possession of the said flat within a period of thirty-six (36) Months with grace period of 6 Months, from the date of commencement of construction upon receipt of all project related approvals including sanction of building plan/ revised plan and approvals of all concerned authorities 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, restraints or restriction from any court/authorities....”

26. Accordingly, the due date of possession was 02.06.2017 and the possession has been delayed by 2 years 2 months and 18 days till the date of decision. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. per month of the carpet area of the unit for the period of delay as per clause 3(c)(iv) of apartment buyer's 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 as also held 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."

Thus, the respondent has failed in handing over the possession of the subject unit as per the terms and conditions of the apartment buyer's agreement and its obligation as envisaged under section 11(4)(a) of the Act *ibid*. As the promoter has failed to fulfil its obligation as per section 11 of the Act *ibid*, the promoter is liable under section 18(1) proviso read with rule 15 of the Rules *ibid*, to pay interest to the complainant, at the prescribed rate, for every month of delay till the offer of possession and not 18% as demanded by the complainant.

Findings of the authority

28. 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 & Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram



shall be entire Gurugram District. 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.

29. The complainant reserves her right to seek compensation from the promoter for which she shall make separate application to the adjudicating officer, if required. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned under section 11 of the said Act. 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.
30. During the proceedings dated 20.08.2019, it has been stated by the counsel for the respondent that the project is registered with the authority. Besides this, there is improvement w.r.t. renewal of license and there is hope that by the end of year, the project will be completed.
31. As per clause 3(a) of apartment buyer's agreement dated 12.02.2013 for the unit in question, the possession was to be handed over to the complainant within a period of 36 months from the date of commencement of construction upon receipt of all project related approvals with a grace period of 6 months

and the consent to establish was granted on 02.12.2013 hence, the due date of possession was 02.06.2017 and the possession has been delayed by 2 years 2 months and 18 days till the date of decision i.e. 20.08.2019. As such, the complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum w.e.f. 02.06.2017 as per section 18(1) proviso of the said Act for every month of delay, till offer of possession.

Decision and directions of the authority

32. 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 directed to pay the interest at the prescribed rate i.e. 10.45% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 02.06.2017 till the offer of possession.

- (ii) The respondent is directed to pay the accrued interest till date at the prescribed rate to the complainant within a period of 90 days from the date of this order. Thereafter, the monthly payment of interest till the offer of possession so accrued shall be paid on or before 10th of every subsequent month.
- (iii) The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- (iv) The promoter shall not charge anything from the complainant which is not a part of the agreement.
- (v) The interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as is being granted to the complainant in the case of delayed possession.

33. Complaint stands disposed of. File be consigned to the registry.



Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.08.2019

Judgement uploaded on 30.08.2019