

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

Complaint no. : 750 of 2018
First date of hearing : 21.01.2019
Date of decision : 21.01.2019

Bhawna Khera
R/o WZ-10, Street no 1, Hind Nagar,
Tilak Nagar, New Delhi: 110018.

..Complainant

Versus

M/s Unitech Ltd, Real Estate Division
(marketing)
Office : 5th floor, Signature Towers, South
City I, Gurugram.

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Tilak Raj Arora Advocate for the complainant

None for the respondent Proceeded ex-parte on 21.01.2019



EX PARTE ORDER

1. A complaint dated 28.08.2018 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 Bhawna Khera against the promoter, M/s Unitech Ltd in respect of apartment described below in the project "Fresco, Nirvana Country" , on account of violation of section 11(4)(a) of the Act ibid.

2. Notices w. r. t. hearing of the case were issued to the respondent on 21.09.2018, 16.11.2018 and 29.11.2018 for making his appearance. Besides this, a penalty of Rs. 5000/- and Rs 1000/- was imposed. However despite due and proper service of notices, the respondent did not come before the authority despite giving him due opportunities as stated above. From the conduct of the respondent it appears that he does not want to pursue the matter before the authority by way of making his personal appearance adducing and producing any material particulars in the matter. As such the authority has no option but to declare the proceedings ex-parte and decide the matter on merits by taking into account legal/factual propositions as raised by the complainant in his complaint





3. Since, the agreement to sell has been executed on 15.12.2006 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 contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

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

1.	Name and location of the project	Fresco , Nirvana Country, Gurugram
2.	Nature of project	Group housing residential scheme
3.	Registered/Unregistered	Not registered
4.	Agreement to sell	15.12.2006
5.	Unit no.	1202, 12 th floor, block 15
6.	Area of unit	1418 sq. ft.
7.	Revised area of unit (as per letter dated 28.08.2015)	1426 sq. ft.
8.	Bookings amount (as per article 2.b of the agreement)	Rs 5,68,901/-
9.	Total consideration As per letter dated 28.08.2015	Rs 61,42,279/-
10.	Total amount paid by the complainant as alleged by the	Rs 65,42,279/-



	complainant	
11.	Possession As per clause 4.a.i.	March 2009
12.	Revised date of delivery of possession as per letter dated 26.05.2015	15.06.2015
13.	Delay	3 months 18 days
14.	Penalty as per article 4.c.ii.	Rs 5/- per sq. ft. per month for the period of delay
15.	Offer of possession (annexure C9)	03.10.2015

FACTS OF THE CASE:

5. The complainant submitted that the respondent had originally allotted apartment no. 1202, floor 12, block no. 15, 2 BHK with super area of 1418 sq. ft. revised to 1426 sq. ft. situated in Fresco, Nirvana Country, Gurugram to one Mr. Gaurav Trikha vide agreement to sell dated 15.12.2006. The complainant had purchased the same from the said allottee for a total sale consideration of Rs.80,00,000/-. The respondent allotted the said apartment by duly endorsing the original agreement entered into between the respondent and Mr. Gaurav Trikha dated 15.12.2006 in favour of the complainant by the respondent.



6. The complainant submitted that the respondent acknowledged receipt of the various payments tendered by the complainant on account of the sale consideration of the said apartment vide letter dated 18.11.2014, whereby the respondent have acknowledged receipt of the requisite amount of Rs.58,51,961/- It is pertinent to mention here the fact that there has never ever been any cause of complaint against the complainant, pertaining to any delay in the payment of the instalments in respect of the said apartment.
7. The complainant submitted that in terms of clause 4 (a) of the agreement to sell dated 15.12.2006, the respondent was under dutiful obligation to complete the construction and provide the necessary finishing, furnishing and also to handover the actual physical possession of the said apartment by March 2009. But the respondent has failed to complete the construction as per the schedule envisaged under article 4 of the said agreement to sell dated 15.12.2006. It is also envisaged under article 4 c ii) of the said agreement to sell that in the event of any delay in offering the possession beyond the period stipulated under article 4 a, i.e.





March 2009, the respondent would be liable to pay penalty for the delayed period @ Rs.5/- per sq. ft. and which was further revised to Rs.17/- per sq. ft. per month vide letter dated 26.05.2015. However, under the guise of the said revision in the rate for delay in offer of possession, the respondent unilaterally revised the date for offering possession to 30.06.2015.

8. The complainant submitted that she approached the respondent office on repeated occasions to apprise the respondent of its failure to honour their commitment and its attendant ramifications. The complainant made repeated requests to hand over the actual physical possession of the said apartment and informed the respondent of the various hardships, mental agony, harassment being faced by her including but not limited to the payment of interest on the loan obtained by her for the said apartment and also having to bear the additional burden of rent @ Rs.31,500/- per month, but the respondent did not pay any heed to her repeated pleadings and rather unilaterally, arbitrarily and capriciously revised the completion/handing over of the



possession of the apartment schedule to 30.06.2015 vide the respondent's letter dated 26.05.2015. However, the said revision of date was never acceptable to the complainant.

9. The complainant submitted that though the said apartment was not ready for possession, but in order to cheat the complainant and in order to extort the entire amount of payment payable at the time of handing over of the possession, the respondent issued a letter no. UL RED:/4065/15 dated 28.08.2015 informing that the respondent in the process of handing over the possession of the said apartment and also expressed their intention of execution and registration of conveyance deed and physical possession of apartment no. 1202, block no. 15 at Fresco Nirvana Country, Gurugram. The said letter dated 28.08.2015, also categorically mentioned in its subject line ""Execution and Registration of conveyance deed and physical possession of apartment no. 1202, block no.15 at Fresco Nirvana Country, Gurgaon", inter-alia mentioning ". Due to the change in the area, the total cost of flat is





now Rs.61,42,279/- (difference in total cost being Rs 33,358/-).

10. The complainant submitted that as she was in urgent need of the said apartment as she was already spending a huge amount of Rs.31,500/- per month towards the monthly rent for the leased/rented residential accommodation. She immediately paid all the amounts as demanded vide the statement of account dated 28.08.2015, as forwarded vide the above referred letter dated 28.08.2015 i.e. Rs.42,267/- vide cheque no. 720304 dated 01.10.2015 drawn on ICICI Bank, Rs.10,584/- vide cheque no 720303 dated 01.10.2015 on ICICI bank and Rs.4,00,000/- towards the cost of registration charges (for execution and registration of conveyance deed) vide bank draft no. 855946 dated 01.10.2015 drawn on/issued by Oriental Bank of Commerce.

11. The complainant submitted that the respondent also informed having unilaterally revised the super area of the said flat by additional 8 sq. ft i.e. from 1418 to 1426 sq. ft and and also raised the demand for registration charges and maintenance charges as well. Further, the respondent also





demanded certain documents in connection with the said execution and registration of conveyance deed and the complainant, promptly complied with the same and submitted all the documents including the duly signed possession letter dated 03.10.2015. In the said letter a false assurance to handover the possession within 45 days was made but never fulfilled till date.

12. The complainant submitted that thereafter, the complainant vide her letter dated 19.04.2016, while informing the respondents about the details of having cleared the entire outstanding payment as above, complained to the respondent about the unwarranted delay in completing the construction leading to grave financial hardships on account of having to pay continued monthly rent @ Rs.31,500/- despite the fact that she had made the entire payment including the sum of Rs.4,00,000/- towards advance payment for execution of registration of conveyance deed in her favour. She also, inter-alia apprised the respondent of the factual position prevailing at the site/location of the said flat/apartment and also during her meeting with the respondent's representative Mr. Ashish





Gaur (the person concerned with the handing over of the possession), also apprised the respondent of the fact that she has obtained the photographs of the said unfinished flat/apartment on 6th April 2016 and also forwarded the copies thereof to the respondent as well. The status of the construction was found to be the same as it was in October 2015 and there had been no progress ever since. Thus the respondent's demand for maintenance charges while the flat/apartment was not complete and was nowhere near completion and also all other charges not contemplated in the agreement to sell and that too even before the completion of the plaster and flooring, were not justified, just absurd and not tenable. The said averments have not been refuted even till date to infer that the respondent have not come up with any amicable solution.



13. The complainant submitted that, as no possession was actually offered/handed over despite lapse of significant period, she again personally visited the site to verify the actual state of affairs and was shocked to note that, the averments raised in the said letter were mere sham and



bogus because there was no change in the already constructed incomplete structure which was lying unattended since long and was still unfinished. Even the plaster and flooring had not yet been commenced. The complainant again obtained the photographs of the said building/structure on the spot and retained the same for her record for being produced before the court of competent jurisdiction in case there arose any need for the same in future.

14. The complainant submitted that in terms of clause 4 (a) of the agreement to sell read with the respondent's letter dated 26.05.2015, the respondents are liable to pay a sum of Rs.24,242/- for each month of delay after 30.03.2009 i.e. from 1.04.2009. In this manner, the respondent has become liable to pay a sum of Rs.26,90,862/- (as on 30.06.2018) and further amount(s) @ Rs.24,242/- for every month of delay in completion and handing over of the possession of the flat thereafter, with interest @ 2% per month till the date of handing over of the actual physical possession of the flat after completion of the construction in all respects and till the date





of realization of the entire amount in full. Further, the respondent is also liable to pay interest @ 2% per month on the amount of Rs.4,00,000/- being withheld illegally ever since 01.10.2015 on the pretext of getting the conveyance deed executed and registered but the same is continued to be delayed for the reasons directly attributable to the respondent. The same amounts to Rs.2,72,000/- as on 30.06.2018.

15. The complainant submitted she has been continuing to suffer irreparable loss by way of having been constrained to spend a sum of Rs.31,500/- per month from November 2014 onwards to meet the monthly rentals due to the respondent's failure to honour their commitment to handover the actual physical possession of the said flat despite lapse of over several years after the scheduled date for the purpose. The said recurring amount of loss suffered by the complainant as at the end of June 2018 amounts to Rs.13,86,000/-. Further, the complainant has also been suffering such mental agony and harassment which cannot be described in words besides having to pay interest of Rs.50,000/- per month on the





amounts of over Rs.50,00,000/- lying deposited with the respondent in respect of the said apartment allotted to her by the respondent. Accordingly, the respondent is also liable to pay the said amounts of interest being suffered by the complainant for the past over 44 months i.e. from November 2014 till June 2018 which amounts to Rs.22,00,000/- as on 30.06.2018 and further recurring Rs.50,000/- per month till its realization in full.

16. The complainant submitted that she has been trying to contact the respondent and its officials to obtain authentic and direct intimation pertaining to the existing state of affairs but to no avail. It is also pertinent to mention here that the respondent is avoiding to contact the complainant and is rather adopting evasive tactics to somehow linger on the matter to usurp her money by raising unwarranted issues/illegal and baseless demands.

17. The complainant submitted respondent has intentionally cheated the complainant by continuing to maintain hostile silence over the matter and have thereby caused wrongful loss to the complainant and wrongful gain to themselves by





continuing to withhold the possession of the property even after having received the entire sale consideration and are neither informing the prevailing state of affairs nor handing over the desired physical possession of the flat to the complainant.

18. The complainant submitted that after all the efforts to resolve the persisting problem failed due to the hostile attitude of the respondent, the complainant got issued a legal notice dated 13.07.2017 and whereby the respondent was called upon through the said legal notice to pay to the complainant or secure to or compound to her satisfaction a sum of Rs. 24,24,200/- (as on 30.07.2017) and further amounts @Rs. 24,242/- for every month of delay in completion and handing over of the possession of the flat and thereafter, with interest @2% per month and also sum of Rs.81,500/- per month ever since 01.04.2009 till the date of handing over of the actual physical possession of the flat after completion of the construction in all respects and till the date of realization of the entire amount in full with interest @ 2% per month, within fifteen days from receipt of the said legal notice. It



was also informed that the respondent was also liable to pay a sum of Rs. 11,000/- towards the cost of legal notice.

ISSUES RAISED BY THE COMPLAINANT:

19. The following issues have been raised by the complainant:
- i. Whether or not the respondent has delayed possession of the booked unit?
 - ii. Whether or not the respondent is liable to refund the money invested by the complainant?

RELIEF SOUGHT BY THE COMPLAINANT:

20. In view of the facts mentioned the following reliefs have been sought by the complainant:
- i. Direct the respondent to complete the construction and thereby deliver possession
 - ii. Direct the respondent to pay delayed possession interests.

DETERMINATION OF ISSUES:

21. No reply has been filed by the respondent. After considering the facts submitted by the complainant and perusal of record



on file, the case is proceeded ex-parte and the authority decides the issues raised by the parties as under

- i. With respect to the **first issue**, the authority came across that as per letter dated 26.05.2015, sent to the complainant by the respondent the possession of the said apartment was to be handed over by 15.06.2015. The possession has been delayed by 3 months 18 days till offer of possession i.e. 03.10.2015. The delay compensation as per clause 4.c.ii. payable by the respondent @ Rs 5/- per sq. ft. per month of the super area of the unit for the period of delay 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."



ii. With respect to the **second issue** raised by the complainant, the offer of possession has been made on 03.10.2015. Since the offer of possession has been made, therefore the respondent is not liable to refund the total amount paid by the complainant.

FINDINGS OF THE AUTHORITY:

22. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

23. The complainant made a submission before the authority under section 34 (f) to ensure compliance of the obligations cast upon the promoter.

24. 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 of the Act and to fulfil its obligations.

25. In the present case, as per clause 4 (a) (i) of the agreement to sell dated 15.12.2006 for unit no. 1202, 12th floor, block -15, in project " Fresco, Nirvana Country, Gurugram, possession was to be handed over to the complainant in March, 2009. Respondent vide letter dated 26.05.2015 under the guise section 4 c (ii) unilaterally revised the date of handing over the possession to 30.06.2015. In addition to this, respondent unilaterally revised the super area of the flat by 8 sq. ft. and cost of the flat too was increased. By virtue of clause of 4(a) of the agreement read with respondent letter dated 26.05.2015, respondent was liable to pay a sum of Rs 24,242/- for each month of delay after 30.03.2009, accordingly, the respondent has become liable to a sum of Rs. 26,90,862/-(as on 30.06.2018) and further amount of Rs. 24,242/- for every month of delay till handing over the possession. It was a construction linked plan. Complainant has already paid Rs. 65,42,279/- to the respondent against a total sale consideration of Rs. 61,42.279/- However, it has



been stated by the counsel that respondent has given symbolic possession. However, the project is incomplete as on date. It is noteworthy that the directors of the respondents are in Tihar jail and the hon'ble Supreme Court has issued instructions that no coercive action can be taken against the respondent as on date. Complainant has annexed certain photographs w.r.t. project which patently show that the project is left incomplete by the respondent, as such buyer/complainant is entitled for delayed possession charges till completion of project and handing it over to the buyer in a proper manner. However, it has been brought on record by the complainant that builder is trying to complete the project in absentio of the director (who is in jail) by charging paltry amount and also compensate the complainant with additional facilities. Counsel for the complainant is directed to find an amicable solution between the parties.

DECISION AND DIRECTIONS OF THE AUTHORITY:

26. Thus, the authority exercising power under section 37 of Real Estate (Regulation and Development) Act, 2016 hereby issues directions:



- i. The respondent is directed to give interest to the complainant at the prescribed rate of 10.75% on the amount deposited by the complainant for every month of delay from the due date of possession i.e. 15.06.2015 *handing over the possession* ~~till offer of possession i.e. 03.10.2015~~ as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.
- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order failing which the complainant is entitled to seek refund the paid amount with interest.

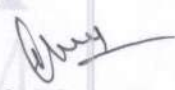
27. The order is pronounced.

28. Case file be consigned to the registry.




(Samir Kumar)

Member


(Subhash Chander Kush)

Member

Dated : 21.01.2019

*Corrected vide order
dated 24/04/2019.*

PROCEEDINGS OF THE DAY	
Day and Date	Monday and 21.01.2019
Complaint No.	750/2018 Case Titled As Bhawna Khera V/S Unitech Ltd
Complainant	Bhawna Khera
Represented through	Shri Tilak Raj Arora, Advocate for the complainant.
Respondent	M/S Unitech Ltd
Respondent Represented through	None for the respondent.
Last date of hearing	
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Since the project is not registered, as such, 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.

Arguments heard.

Complaint was filed on 28.08.2018. Notices w.r.t. reply to the complaint were issued to the respondent on 21.09.2018, 16.11.2018 and 29.11.2018. Besides this, a penalty of Rs.5,000/- and Rs.10,000/- was also imposed on 16.11.2018 and on 29.11.2018 for non-filing of reply even after service of notices. However, despite due and proper service of notices, the respondent neither filed the reply nor come present before the authority.

From the above stated conduct of the respondent, it appears that respondent does not want to pursue the matter before the authority by way of making personal appearance by adducing and producing any material particulars in the matter. As such, the authority has no option but to proceed ex-parte against the respondent and to decide the matter on merits by taking into account legal/factual propositions, as raised, by the complainant in his complaint.

A final notice dated 14.01.2019 by way of email was sent to both the parties to appear before the authority on 21.1.2019.

Brief facts of the matter are as under :-

As per clause 4 (a) (i) of the Builder Buyer Agreement dated 15.12.2006 for unit No. 1202, 12th Floor, Block -15, in project " Fresco, Nirvana Country, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of BBA + 6 months grace period. **The respondent revised the date of possession as 15.6.2015.** It was a construction linked plan. Complainant has already paid Rs.65,42,279 to the respondent against a total sale consideration of Rs.61,42,279. However, it has been stated by the counsel that respondent has given symbolic possession. However, the project is incomplete as on date. It is noteworthy that the directors of the respondents are in Tihar Jail and the Hon'ble SC has issued instructions that no coercive action can be taken against the respondent as on date. Complainant has annexed certain photographs w.r.t. project which patently show that the project is left incomplete by the respondent, as such buyer/complainant is entitled for delayed possession charges till completion of project and

handing it over to the buyer in a proper manner. However, it has been brought on record by the complainant that builder is trying to complete the project in absentio of the director (who is in jail) by charging paltry amount and also compensate the complainant with additional facilities. Counsel for the complainant is directed to find an amicable solution between the parties. However, complainant shall be entitled for delayed possession charge @ 10.75% till final delivery of possession.

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 handing over the possession shall be paid before 10th of subsequent month.

Complaint is disposed of accordingly. Detailed order will follow.

File be consigned to the registry.

Samir Kumar
(Member)
21.09.2019

Subhash Chander Kush
(Member)

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

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APPEARANCE:

Shri Tilak Raj Arora

Advocate for the complainant

None for the respondent

Proceeded ex-parte on 21.01.2019



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1. A complaint dated 28.08.2018 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

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2. Notices w. r. t. hearing of the case were issued to the respondent on 21.09.2018, 16.11.2018 and 29.11.2018 for making his appearance. Besides this, a penalty of Rs. 5000/- and Rs 1000/- was imposed. However despite due and proper service of notices, the respondent did not come before the authority despite giving him due opportunities as stated above. From the conduct of the respondent it appears that he does not want to pursue the matter before the authority by way of making his personal appearance adducing and producing any material particulars in the matter. As such the authority has no option but to declare the proceedings ex-parte and decide the matter on merits by taking into account legal/factual propositions as raised by the complainant in his complaint



3. Since, the agreement to sell has been executed on 15.12.2006 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 contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

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11.	Possession As per clause 4.a.i.	March 2009
12.	Revised date of delivery of possession as per letter dated 26.05.2015	15.06.2015
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15.	Offer of possession (annexure C9)	03.10.2015

FACTS OF THE CASE:

5. The complainant submitted that the respondent had originally allotted apartment no. 1202, floor 12, block no. 15, 2 BHK with super area of 1418 sq. ft. revised to 1426 sq. ft. situated in Fresco, Nirvana Country, Gurugram to one Mr. Gaurav Trikha vide agreement to sell dated 15.12.2006. The complainant had purchased the same from the said allottee for a total sale consideration of Rs.80,00,000/-. The respondent allotted the said apartment by duly endorsing the original agreement entered into between the respondent and Mr. Gaurav Trikha dated 15.12.2006 in favour of the complainant by the respondent.



6. The complainant submitted that the respondent acknowledged receipt of the various payments tendered by the complainant on account of the sale consideration of the said apartment vide letter dated 18.11.2014, whereby the respondent have acknowledged receipt of the requisite amount of Rs.58,51,961/- It is pertinent to mention here the fact that there has never ever been any cause of complaint against the complainant, pertaining to any delay in the payment of the instalments in respect of the said apartment.

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March 2009, the respondent would be liable to pay penalty for the delayed period @ Rs.5/- per sq. ft. and which was further revised to Rs.17/- per sq. ft. per month vide letter dated 26.05.2015. However, under the guise of the said revision in the rate for delay in offer of possession, the respondent unilaterally revised the date for offering possession to 30.06.2015.

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11. The complainant submitted that the respondent also informed having unilaterally revised the super area of the said flat by additional 8 sq. ft i.e. from 1418 to 1426 sq. ft and and also raised the demand for registration charges and maintenance charges as well. Further, the respondent also

demanded certain documents in connection with the said execution and registration of conveyance deed and the complainant, promptly complied with the same and submitted all the documents including the duly signed possession letter dated 03.10.2015. In the said letter a false assurance to handover the possession within 45 days was made but never fulfilled till date.

12. The complainant submitted that thereafter, the complainant vide her letter dated 19.04.2016, while informing the respondents about the details of having cleared the entire outstanding payment as above, complained to the respondent about the unwarranted delay in completing the construction leading to grave financial hardships on account of having to pay continued monthly rent @ Rs.31,500/- despite the fact that she had made the entire payment including the sum of Rs.4,00,000/- towards advance payment for execution of registration of conveyance deed in her favour. She also, inter-alia apprised the respondent of the factual position prevailing at the site/location of the said flat/apartment and also during her meeting with the respondent's representative Mr. Ashish



Gaur (the person concerned with the handing over of the possession), also apprised the respondent of the fact that she has obtained the photographs of the said unfinished flat/apartment on 6th April 2016 and also forwarded the copies thereof to the respondent as well. The status of the construction was found to be the same as it was in October 2015 and there had been no progress ever since. Thus the respondent's demand for maintenance charges while the flat/apartment was not complete and was nowhere near completion and also all other charges not contemplated in the agreement to sell and that too even before the completion of the plaster and flooring, were not justified, just absurd and not tenable. The said averments have not been refuted even till date to infer that the respondent have not come up with any amicable solution.



13. The complainant submitted that, as no possession was actually offered/handed over despite lapse of significant period, she again personally visited the site to verify the actual state of affairs and was shocked to note that, the averments raised in the said letter were mere sham and

bogus because there was no change in the already constructed incomplete structure which was lying unattended since long and was still unfinished. Even the plaster and flooring had not yet been commenced. The complainant again obtained the photographs of the said building/structure on the spot and retained the same for her record for being produced before the court of competent jurisdiction in case there arose any need for the same in future.

14. The complainant submitted that in terms of clause 4 (a) of the agreement to sell read with the respondent's letter dated 26.05.2015, the respondents are liable to pay a sum of Rs.24,242/- for each month of delay after 30.03.2009 i.e. from 1.04.2009. In this manner, the respondent has become liable to pay a sum of Rs.26,90,862/- (as on 30.06.2018) and further amount(s) @ Rs.24,242/- for every month of delay in completion and handing over of the possession of the flat thereafter, with interest @ 2% per month till the date of handing over of the actual physical possession of the flat after completion of the construction in all respects and till the date



of realization of the entire amount in full. Further, the respondent is also liable to pay interest @ 2% per month on the amount of Rs.4,00,000/- being withheld illegally ever since 01.10.2015 on the pretext of getting the conveyance deed executed and registered but the same is continued to be delayed for the reasons directly attributable to the respondent. The same amounts to Rs.2,72,000/- as on 30.06.2018.

15. The complainant submitted she has been continuing to suffer irreparable loss by way of having been constrained to spend a sum of Rs.31,500/- per month from November 2014 onwards to meet the monthly rentals due to the respondent's failure to honour their commitment to handover the actual physical possession of the said flat despite lapse of over several years after the scheduled date for the purpose. The said recurring amount of loss suffered by the complainant as at the end of June 2018 amounts to Rs.13,86,000/-. Further, the complainant has also been suffering such mental agony and harassment which cannot be described in words besides having to pay interest of Rs.50,000/- per month on the



amounts of over Rs.50,00,000/- lying deposited with the respondent in respect of the said apartment allotted to her by the respondent. Accordingly, the respondent is also liable to pay the said amounts of interest being suffered by the complainant for the past over 44 months i.e. from November 2014 till June 2018 which amounts to Rs.22,00,000/- as on 30.06.2018 and further recurring Rs.50,000/- per month till its realization in full.

16. The complainant submitted that she has been trying to contact the respondent and its officials to obtain authentic and direct intimation pertaining to the existing state of affairs but to no avail. It is also pertinent to mention here that the respondent is avoiding to contact the complainant and is rather adopting evasive tactics to somehow linger on the matter to usurp her money by raising unwarranted issues/illegal and baseless demands.

17. The complainant submitted respondent has intentionally cheated the complainant by continuing to maintain hostile silence over the matter and have thereby caused wrongful loss to the complainant and wrongful gain to themselves by



continuing to withhold the possession of the property even after having received the entire sale consideration and are neither informing the prevailing state of affairs nor handing over the desired physical possession of the flat to the complainant.

18. The complainant submitted that after all the efforts to resolve the persisting problem failed due to the hostile attitude of the respondent, the complainant got issued a legal notice dated 13.07.2017 and whereby the respondent was called upon through the said legal notice to pay to the complainant or secure to or compound to her satisfaction a sum of Rs. 24,24,200/- (as on 30.07.2017) and further amounts @Rs. 24,242/- for every month of delay in completion and handing over of the possession of the flat and thereafter, with interest @2% per month and also sum of Rs.81,500/- per month ever since 01.04.2009 till the date of handing over of the actual physical possession of the flat after completion of the construction in all respects and till the date of realization of the entire amount in full with interest @ 2% per month, within fifteen days from receipt of the said legal notice. It



was also informed that the respondent was also liable to pay a sum of Rs. 11,000/- towards the cost of legal notice.

ISSUES RAISED BY THE COMPLAINANT:

19. The following issues have been raised by the complainant:
- i. Whether or not the respondent has delayed possession of the booked unit?
 - ii. Whether or not the respondent is liable to refund the money invested by the complainant?

RELIEF SOUGHT BY THE COMPLAINANT:

20. In view of the facts mentioned the following reliefs have been sought by the complainant:
- i. Direct the respondent to complete the construction and thereby deliver possession
 - ii. Direct the respondent to pay delayed possession interests.



DETERMINATION OF ISSUES:

21. No reply has been filed by the respondent. After considering the facts submitted by the complainant and perusal of record

on file, the case is proceeded ex-parte and the authority decides the issues raised by the parties as under

- i. With respect to the **first issue**, the authority came across that as per letter dated 26.05.2015, sent to the complainant by the respondent the possession of the said apartment was to be handed over by 15.06.2015. The possession has been delayed by 3 months 18 days till offer of possession i.e. 03.10.2015. The delay compensation as per clause 4.c.ii. payable by the respondent @ Rs 5/- per sq. ft. per month of the super area of the unit for the period of delay 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.”



ii. With respect to the **second issue** raised by the complainant, the offer of possession has been made on 03.10.2015. Since the offer of possession has been made, therefore the respondent is not liable to refund the total amount paid by the complainant.

FINDINGS OF THE AUTHORITY:

22. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

23. The complainant made a submission before the authority under section 34 (f) to ensure compliance of the obligations cast upon the promoter.

24. 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 of the Act and to fulfil its obligations.

25. In the present case, as per clause 4 (a) (i) of the agreement to sell dated 15.12.2006 for unit no. 1202, 12th floor, block -15, in project “ Fresco, Nirvana Country, Gurugram, possession was to be handed over to the complainant in March, 2009. Respondent vide letter dated 26.05.2015 under the guise section 4 c (ii) unilaterally revised the date of handing over the possession to 30.06.2015. In addition to this, respondent unilaterally revised the super area of the flat by 8 sq. ft. and cost of the flat too was increased. By virtue of clause of 4(a) of the agreement read with respondent letter dated 26.05.2015, respondent was liable to pay a sum of Rs 24,242/- for each month of delay after 30.03.2009, accordingly, the respondent has become liable to a sum of Rs. 26,90,862/- (as on 30.06.2018) and further amount of Rs. 24,242/- for every month of delay till handing over the possession. It was a construction linked plan. Complainant has already paid Rs. 65,42,279/- to the respondent against a total sale consideration of Rs. 61,42,279/- However, it has



been stated by the counsel that respondent has given symbolic possession. However, the project is incomplete as on date. It is noteworthy that the directors of the respondents are in Tihar jail and the hon'ble Supreme Court has issued instructions that no coercive action can be taken against the respondent as on date. Complainant has annexed certain photographs w.r.t. project which patently show that the project is left incomplete by the respondent, as such buyer/complainant is entitled for delayed possession charges till completion of project and handing it over to the buyer in a proper manner. However, it has been brought on record by the complainant that builder is trying to complete the project in absentio of the director (who is in jail) by charging paltry amount and also compensate the complainant with additional facilities. Counsel for the complainant is directed to find an amicable solution between the parties.



DECISION AND DIRECTIONS OF THE AUTHORITY:

26. Thus, the authority exercising power under section 37 of Real Estate (Regulation and Development) Act, 2016 hereby issues directions:

- i. The respondent is directed to give interest to the complainant at the prescribed rate of 10.75% on the amount deposited by the complainant for every month of delay from the due date of possession i.e. 15.06.2015 till offer of possession i.e. 03.10.2015 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.
- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order failing which the complainant is entitled to seek refund the paid amount with interest.

27. The order is pronounced.

28. Case file be consigned to the registry.



(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Dated : 21.01.2019

Judgement uploaded on 27.02.2019