



HARERA
GURUGRAM

HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

हरियाणा भू-संपदा विनियामक प्राधिकरण, गुरुग्राम

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

PROCEEDINGS OF THE DAY

Day and Date	Monday and 26.08.2019
Complaint No.	205/2018 Case titled as Avinash Yadav & Another vs Today Homes & Infrastructure Limited
Complainant	Avinash Yadav & Another
Represented through	Shri Sushil Yadav, Advocate
Respondent	Today Homes & Infrastructure Limited
Respondent Represented	None for the respondent
Last date of hearing	2.8.2019
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

It is pertinent to point out here that the matter has been finally decided vide order dated 17.10.2018. As per order dated 2.5.2019 passed by the Hon'ble Real Estate Appellate Tribunal, Chandigarh, the relevant para of which is as under:-

"It is made clear that this order of ours will not apply to the orders directions and decisions, which has already attained finality".

More-over, the Local Commissioner report dated 20.2.2019, who was appointed by the authority on the request dated 21.12.2018 submitted by the respondent, has also been considered wherein it has been specifically mentioned that physically about 46% construction work has been completed



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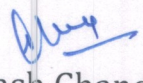
at site. The above progress report is not inconsonance with the claim of the respondent that more than 75% work is complete at site. Therefore, the request of respondent for rectification of order dated 17.10.2018 on this pretext cannot be conceded to at this late juncture when the order pronounced on 17.10.2018 has already attained finality.

By virtue of all portents of law, the matter has reached finality and is res-judicata and cannot be re-opened at a subsequent stage. The report of LC at a subsequent stage is not relevant in the present case.

Application filed by the applicant for rectification of the order dated 17.10.2018 is not maintainable and the prayer made by the applicant is declined.

Order dated 2.5.2019 passed by the learned Appellate Tribunal in appeal No. 6 of 2018 titled as Sameer Mahawar versus MG Housing Pvt Ltd which defines the jurisdiction of the Authority. Since order dated 17.10.2018 was passed much prior to the pronouncement of order dated 2.5.2019 of the learned Appellate Tribunal, as such this order is beyond the pale of order dated 2.5.2019 and thus has attained finality. File be consigned to the registry.


Samir Kumar
(Member)
26.08.2019


Subhash Chander Kush
(Member)

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

Complaint No. : 205 of 2018
Date of Institution : 27.04.2018
Date of Decision : 17.10.2018

1. Mr. Avinash Yadav
2. Mr. Vivek Kumar
H.No. 25/38 Rajiv Colony NH-8 Gurgaon-
1222002, Haryana
Versus

...Complainants

M/s Today Homes And Infrastructures
Ltd.
Office Callidora Marketing Site, Sector-
73, Behind DPG College, Subhash Chowk
to Hero Honda Road, Gurgaon-122001

...Respondent

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Complainant Vivek Kumar in Advocate for the complainants
person with Shri Sushil Yadav

Shri Naveen Jakhar, Assistant Advocate for the respondent
Manager Legal on behalf of the
respondent



ORDER

1. A complaint dated 27.04.2018 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 complainants Mr. Avinash Yadav and Mr. Vivek Kumar, against the promoter M/s Today Homes and Infrastructures Ltd. on account of violation of clause 21 of the builder-buyer agreement executed on 26.05.2012 for unit no. 0704,7th floor, tower-T5 in the project “Today Canary Green”, Sector-73, Gurugram for not giving possession on the due date which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid*.

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

1.	Name and location of the project	Today Canary Green, Sector-73, Gurugram
2.	Registered/Unregistered	Not registered
3.	DTCP licence no.	03 of 2011
4.	Licence valid/renewal upto	05.01.2015
5.	Unit no.	0704,7 th Floor in T-5
6.	Total cost	Rs. 69,18,220/-
7.	Total amount paid by the complainant as per statement of account dated 16.06.2018	Rs. 60,94,706/-
8.	Percentage of consideration amount	90% Approx.
9.	Date of execution of BBA	26.05.2012
10.	Date of delivery of possession.	Clause 21 i.e.36 months from the date of execution of the Agreement + with 6 months grace period i.e. 26.11.2015



11.	Delay of number of months/ years upto	2 Years 11 Months
12.	Penalty Clause as per builder buyer agreement dated	Clause 21- Rs. 5/- per sq. ft. per month
13.	Cause of delay in delivery of possession	Due to force majeure

3. The details provided above, have been checked as per record of the case file. A builder buyer agreement is available on record for Unit No. 0704, 7th Floor in T-5 according to which the possession of the aforesaid unit was to be delivered by 26.11.2015. The promoter has failed to deliver the possession of the said unit to the complainants by the due date as per builder buyer agreement dated 26.05.2012. Therefore, the promoter has not fulfilled his committed liability till date.
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 12.07.2018. The case came up for hearing on 30.05.2018, 12.07.2018, 28.08.2018 and 04.09.2018. The reply has been filed on behalf of the respondent on dated 12.07.2018.



Facts of the complaint

5. That the complainants with the consent and permission of the respondent purchased the said flat from Mr. Ravinder Walia and Mrs. Deepti Walia and on 11.09.2012 the respondent

endorsed names of the complainants on the BBA dated 26.05.2012. As per BBA the respondent had allotted a Unit No. 0704 on 7th Floor in T-5 having super area of 1640 sq. Ft.

6. The complainants submitted that they made payment of Rs. 57,95,414/- to the respondent vide different cheques on different dates and further submitted that the complainants visited the site but was surprised to see that the construction work is not in progress and no one was present at the site to address the queries of the complainants. The only intention of the respondent was to take payments for the tower without completing the work. That despite receiving of 85-90% approximately payment of all the demands raised by the respondent for the said flat and despite repeated requests and reminders over phone calls and personal visits of the complainants, the respondent has failed to deliver the possession of the allotted flat to the complainants within stipulated period.



The respondent has incorporated the clause in one sided buyers agreement and offered to pay a sum of Rs.5/-per sq.ft for every month of delay. If we calculate the amount in terms of financial charges, it comes to approximately @ 2% per annum, interest rate, respondent charges, 18% per annum interest on delayed payment.

8. The complainants stated that on the ground of parity and equity the respondent also be subjected to the same rate of interest then the respondent is liable to pay interest on the amount paid by the complainants @ 18% per annum to be compounded from the promise date of possession till the flat is actually delivered to the complainant.
9. The complainants submitted that they have requested the respondent several times on telephonic calls and also personally visiting the office of the respondent either to deliver a possession of the flat in question or to refund the amount along with interest @ 18% per annum on the amount deposited by the complainant but respondent has flatly refused to do so.
10. **Issues raised by the complainants**
- The respondent is not starting the construction. It could be seen here that the respondent has incorporated the clause is one sided buyer agreement which is unjustified?
 - That flat has not been handed over to the petitioner till today and there is no reasonable justification for the delay?
 - The interest cost being demanded by the respondent is very higher i.e. 18% which is unjustified and not reasonable,



whereas the banks are lending the loan on @ 10.5 % or 8.75%.

11. The relief sought by the complainants as follows

- i. Direct the respondent to handover the possession of the respective flat to the complainants.
- ii. Direct the respondent to refund the amount of Rs. 57,95,414/- along with interest @ 18 % per annum on compounded rate from the date of booking of the flat in question.

REPLY

12. The respondent submitted that complainants have not stated that they are staying in rented house and have booked the flat for re-selling or to rent. Therefore, it is clear that this complaint filed by complainants is only for undue advantage.
13. The respondent submitted that the complainants have defaulted in payment of instalments of demands. Respondent submitted that the power to adjudicate the compensation under section 12,14,18,19 has been vested in the judicial officer which shall be appointed by the appropriate government. As per section 71, this authority has no jurisdiction since power to adjudicate upon the compensation



has been vested with judicial officer and this authority has no jurisdiction till the project gets the registration.

14. The respondent submitted that till the time, the subject project did not get the registration certificate from HARERA, the jurisdiction of this hon'ble authority cannot be invoked.
15. The respondent stated that the project on account of land cost, construction expenses, advance to contractors, administration etc and civil structure of project is almost completed.
16. The respondent submitted that the present complaint is premature and period of delivery of 36 months as defined in clause 21 of the agreement to sell dated 26.05.2012 it is clearly stated "the physical possession of the said unit is proposed to be delivered by the company to the allottee within 36 months".
17. It is pertinent to mention that in case the complainants desire for cancellation of the allotment, the same may be considered subject to the terms and conditions of clause 9 of the agreement to sell dated 26.05.2012.
18. The respondent submitted that the said unit was booked by the complainants on 17.11.2010 and agreement to sell was executed between the parties on 26.05.2012.



19. The respondent submitted that as per clause 22, any dispute with construction agency has to be treated as force majeure event and the contractor could not complete the project in time. Other reasons for delay due to non-availability of raw material, demonetization policy dated 08.11.2016, recession in real estate.

20. **Determination of issues**

- i. Regarding **first and second issue** raised by the complainants, that as per clause 21 of the builder-buyer agreement, the company proposed to hand over the possession of the said unit by 26.11.2015. The clause regarding possession of the said unit is reproduced below:

“ 21 POSSESSION OF FLOOR

Construction of the flat is likely to be completed within a period of 36 months from the date of execution of the agreement, with a grace of six months”

Accordingly, the due date of possession was 26.11.2015. Therefore, there is delay of 2 years 11 months in handing over the possession. As far as the penalty clause in case of delay in possession is concerned which is Rs. 5/sq. ft. of the super area per month, it is held to be one sided as also held in para 181 of the judgment in **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, 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. Regarding **third issue** raised by the complainants, the respondent is demanding exorbitant rate of interest that is 18% for delay in making payments which is unjustified and unreasonable.

21. As the possession of the flat was to be delivered by 26.11.2015 as per the clause referred above, the authority is of the view that the promoter has violated section 11(4)(a) of the Haryana Real Estate (Regulation And Development) Act, 2016, which is reproduced as under:



“11.4 The promoter shall—

- (a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be,*

to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."

22. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. Section 34(f) is reproduced below:

"34 (f) Function of Authority –

To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder."

It has been requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

37. Powers of Authority to issue directions

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.

23. As per obligations on the promoter under section 18(1) proviso, in case the allottee wishes to withdraw from the project, the promoter



is obligated to refund the amount paid by the complainants along with interest at the prescribed rate as the promoter has not fulfilled his obligation. Section 18(1) is reproduced below:

“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act

Or

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

The complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.



Findings of authority

24. 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 complainants at a later stage.

25. The authority has decided to take suo-motu cognizance against the said promoter for not getting the project registered and for that separate proceeding will be initiated against the respondent u/s 59 of the Act.

26. Keeping in the view of the authority, project is not registered as on date. Respondent moved an application before the authority for registration of project and the registration branch has raised certain queries as their licence is not renewed since 5.1.2015. As per statement of the respondent, 30% of the work has been completed at site. Complainants have been made to suffer for no fault on his part and is seeking refund under the provisions of Section 18 (i) of the Real Estate (Regulation And Development) Act, 2016. Since builder is not serious in his approach towards the completion of project.



Directions of authority

27. Thus, the authority, exercising powers vested in it under section 37 of the Haryana Real Estate (Regulation And Development) Act, 2016 hereby issue following direction to the respondent:

i. The respondent is directed to give the refund of the money received by the respondent from the complainants i.e. Rs. 60,94,706 the money to be refunded along with prescribed rate of interest i.e. 10.45% per annum within a period of 90 days.

28. The order is pronounced.

29. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

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Haryana Real Estate Regulatory Authority, Gurugram

Dated : 17.10.2018

