



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.	184/2018 Case titled as Rajesh Uppal & Another vs Today Homes & Infrastructure Pvt. Ltd.
Complainant	Rajesh Uppal & Another
Represented through	Shri Suresh Kumar Chitkara representative on behalf of the complainant.
Respondent	Today Homes & Infrastructure Pvt. Ltd.
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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
नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

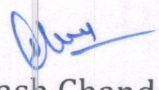
at site. The above progress report is not inconsonance with the claim of the respondent that more than 75% work is complete at site. Therefore, the request of respondent for rectification of order dated 17.10.2018 on this pretext cannot be conceded to at this late juncture when the order pronounced on 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. : 184 of 2018
First date of hearing: 24.05.2018
Date of Decision : 17.10.2018

Rajesh Uppal and Rahil Uppal
A-288, South city -1,
Gurugram

Complainants

Versus

M/S Today Homes and Infrastructure Pvt Ltd
Upper Ground Floor 1-11, Ambadeep Building
K G Marg

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shree V.K Kalra

Authorised representative on
behalf of the complainants

Shri Arun Kumar Yadav

Advocate for the respondent

ORDER

1. A complaint dated 20.04.2018 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 complainant Rajesh Uppal and Rahil Uppal, against the promoter M/s Today Homes and Infrastructure Pvt. Ltd., on account of violation of the clause



23 of the apartment buyer's agreement executed on 14.02.2013 in respect of apartment number D1/0302 having super area 3650sq. tower no 3 in the project 'Royal Elegangia' for not handing over possession on the due date which is an obligation under section 11(4)(a) of the Act ibid.

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

1.	Name and location of the project	"Royal Elegangia", Village Behrampur, Sector-73, District Gurugram.
2.	RERA registered/ not registered.	Not registered
3.	Apartment/unit no.	D1/0302 Tower no. 3
4.	Apartment measuring	3650 sq. ft.
5.	Applied for booking	16.05.2012
6.	Date of execution of apartment buyer's agreement	14.02.2013
7.	Payment plan	Construction linked payment plan
8.	Basic sale price as per the said agreement	Rs.21,46,200/-
9.	Total amount paid by the complainant till date	Rs.18,710,355/-
10.	Percentage of consideration amount	Approx. 88.4 percent
11.	Date of delivery of possession as per clause 23 of apartment buyer's agreement (36 months from the date of execution of this agreement + 6 months grace period for unforeseen delays)	14.08.2016
12.	Building plans approved on	Not REGISTERED
13.	Delay in handing over possession till date	2 years 2 months 3 days



14.	Penalty clause as per apartment buyer's agreement dated 14.02.13	Clause 23 of the agreement.
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3. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainants and the respondent. An apartment buyer's agreement is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 14.08.2016. Neither the respondents have delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft. of the super area for every month of delay until actual date fixed by the company for handing over of possession of the said apartment to the allottee as per clause 23 of apartment buyer's agreement dated 14.02.2013. Therefore, the promoter has not fulfilled his committed liability as on date.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 27.06.2018. The case came up for hearing on 24.05.2018, 11.07.2018, 28.08.2018, 04.09.2018 and 26.09.2018. The reply filed on behalf of the respondent has been perused.



Facts of the complaint

5. Briefly stated, the facts of the complaint are that the complainants namely Rajesh Uppal and Rahil Uppal had jointly booked a residential flat for their personal use in the year 2012 with respondent M/S Today Homes and Infrastructure pvt ltd. The respondent agreed to handover the possession of the said flat within 36 months + 6 Months (i.e 13.2.2016) as per the clause 23 of agreement to sell dated 14.2.2013. The respondent has failed to handover the possession of the said flat within such period as agreed in the agreement.
6. The complainants submitted that the respondent is company incorporated under the Companies Act, 1956 and is a promoter within the meaning of section 2(zk) of the Act ibid.
7. The complainants submitted that the complainants took house loan from ICICI and AXIS bank to full fill terms of agreement by paying instalment in time to the developers. The petitioner is still paying exorbitant and expenses including interest to the bank per month. The complainants are salaried employees and invested there hard earned money with the respondent that he



will be handling over the possession within time, hence, the complainants are entitled to claim loss and damage from the respondent.

8. The complainants visited the construction site on 22.03.2018 and it is found that construction of the tower is not as per the schedule and it is also not possible to handover the possession of said flat/unit in near future.
9. The complainants submitted that since the construction was not being carried on and delivery of possession was not given within the stipulated time of 60 months (with grace period) from the date of approval of building plan in May 2012, the complainants terminated the buyer's agreement by its letter dated 10.01.2018 and requested the respondent to refund the entire amount paid by the complainants alongwith compensation and interest.
10. The complainants submitted that respondent also offered the petitioners/ complainants alternative flat in another tower, which is not acceptable, because offer flat is not same specification as booked in the year 2012.



11. The complainants are seeking refund of the entire amount paid alongwith interest @24 % p a.

12. **Issues raised by the complainants are as follow:**

- i. **Whether the respondent is delaying in handing over the possession of the unit/ flat to the complainants intentionally?**
- ii. **Whether the petitioner/ complainants are entitled to refund entire amount paid to respondent/ developer with interest?**

13. **Relief sought by the complainants:**

The complainants are seeking the following reliefs:

- i. allow the present complaint in favour of the complainants and against the respondent.
- ii. direct the respondent to refund the entire amount of Rs.18710355/- paid to the respondent with interest of 24% from the date of receipt to the date of realisation.



The complainants during proceeding dated 26.07.2018 stated that they are not seeking compensation as mentioned in the complaint but are seeking directions from the authority to the promoter to comply with its obligations.

Respondent's reply:

The respondent submitted as preliminary objection that hon'ble authority does not have the jurisdiction to decide this complaint pertaining to refund and interest.

14. The respondent submitted that the complainants have nowhere alleged in their complaint that they are presently residing at any rented house and have not submitted any rent agreement in this regard. This shows that the complainants have their own house and booked the said flat in question only for speculative purpose and reselling the same in the market or by letting out on rent to earn a fixed rental income in the real estate market.

15. The respondent submitted that complainants have already defaulted in the payment of instalments of demand dated 08.10.2012, 26.07.2013 and 15.05.2014. Complainants have



already delayed the payment of demands as per payment plan opted by them and breached the terms of agreement to sell therefore, the complainants have no right to file this instant complaint.

16. The respondent submitted that the complainants sought refund with interest and no judicial officer has been appointed by the appropriate government. Therefore, this complaint is liable to be dismissed on this ground alone under section 71 of the RERA Act.

17. The respondent submitted that time is not the essence of the contract and the delay which in any event is attributable to force majeure events would at best entitle the allottees, to delay due to the force majeure events.

18. The respondent submitted that as per the provisions of the Act ibid, the promoter is liable to compensate the allottee only in the event that the promoter fails to complete or is unable to give possession of an apartment in accordance with the terms of the agreement for sale. It is thus stated that the present complaint is premature and without cause. The complaint



ought to be dismissed for lack of cause at the very outset. It is further stated that the complainants cannot be permitted to change the commitment period in accordance to their convenience.

19. The respondent submitted that substantial amount running into hundreds of crores has already been incurred by the promoter for project and civil construction. Structure of the project is almost complete and the promoter in its honest endeavors fully committed to complete the project. So it is not open for the complainant to litigate the matter at this juncture and seek withdrawal of payment made in this project.
20. The respondent submitted that if complainants desire for cancellation of the allotment, the same may be considered subject to the terms and condition of agreement as prescribed in clause(10) of the allotment letter dated 14.02.2013.
21. The respondent submitted that as per section 18 of the RERA act, 2016 a promoter is liable to return the amount paid by the allottee and is also liable to compensation if the promoter fails to complete the project or is unable to give possession of the apartment in accordance with terms of agreement to sale. The Bombay high court has also passed the judgement on



06.12.2017 and have cleared that the provision of RERA are prospective in nature.

22. Determination of issues:

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

23. With respect to the **first issues** raised by the complainants, the authority came across that as per clause 23 of apartment buyer's agreement, date of delivery of possession as per clause 23 of apartment buyer's agreement (36 months from the date of execution of this agreement + 6 months grace period for unforeseen delays). Therefore, the due date of handing over possession will be computed from 14.02.2013. Accordingly, the due date of possession was 14th August 2016 and the possession has been delayed by two years two months and three days till the date of decision. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. of the super area for every month of delay until the actual date fixed by the company for handing over of possession of the said apartment to the allottee as per clause 23 of apartment buyer's agreement.



24. 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, 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.”

25. As the possession of the flat was to be delivered by 14th August 2016 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the 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."

26. With respect to **second issue** 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 are seeking a 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 toward the completion of the project. Therefore, complainants are entitled to get the refund of the amount to the complainants along with prescribed rate of interest i.e 10.45% per annum



27. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

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.

The complainants 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 which is reproduced below:

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.



28. As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainants, at the prescribed rate, for

every month of delay till the handing over of possession.

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:

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.

Findings and directions of the authority

29. 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.



30. 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 project is not registered as on date. Respondent moved an application for registration of the project before the authority and the registration branch has raised certain queries as their license is not renewed since 5.01.2015.
- ii. 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 are seeking a 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 toward the completion of the project and as such, authority directs/ orders for refund of the amount to the



complainants along with prescribed rate of interest
i.e 10.45% per annum. The complaint is disposed of
accordingly.

31. The order is pronounced.

32. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Date: 17.10.2018

Judgement uploaded on 09.09.2019



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