

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

Complaint no. : 2032 of 2019
First date of hearing: 04.09.2019
Date of decision : 11.09.2019

Ms. Anita Yadav
R/o C-144, Mayfeild Garden, Sector 50, near
Manav Rachna International School,
Gurugram.

Complainant

Versus

M/s Apex Buildwell Pvt. Ltd.
Regd. Office: 14A/36, W.E.A. Karol Bagh,
New Delhi.
Also at: Plot No. 25 B,
Sector-32, Gurugram.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Harshwarddhan Yadav Advocate for the complainant
Shri Sandeep Choudhary Advocate for the respondent

ORDER

1. A complaint dated 21.05.2019 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. Anita Yadav, 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 09.03.2013 in respect of apartment number 997, 9th floor, block/tower 'Iris' 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 09.03.2013 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.	HARERA registered/ not registered.	Registered vide no. 40 of 2019 dated 08.07.2019
6.	HARERA registration valid up to	01.12.2019
7.	Provisional allotment of unit	23.10.2012 (page 22 of complaint)
8.	Apartment/unit no.	997 on 9 th floor, block/tower 'Iris'



9.	Apartment measuring	48 sq. mtr. of carpet area
10.	Date of execution of apartment buyer's agreement	09.03.2013
11.	Basic sale price as per clause 1.2(a) of apartment buyer's agreement	Rs.16,00,000/-
12.	Total amount paid by the complainant till date	Rs.15,71,958/- (as per receipts annexed at page 21,24-25,43 - 47)
13.	Consent to establish granted on	02.12.2013
14.	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)
15.	Delay in handing over possession till date i.e. 11.09.2019	2 years 3 months 9 days
16.	Penalty clause as per clause 3(c)(iv) of apartment buyer's agreement dated 09.03.2013	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 09.03.2013 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



09.03.2013. 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 04.09.2019. The reply filed on behalf of the respondent on 12.06.2019 has been perused by the authority.

Facts of the complaint

6. The complainant submitted that the present complaint is being filed by the complainant against the respondent as the respondent has, in a pre-planned manner cheated and defrauded the complainant of their hard-earned money and have rendered deficient services by not providing possession of the residential apartment purchased by the complainant. The complainant for his own bonafide residential use has purchased the residential apartment in question.
7. The complainant submitted that the respondent issued an advertisement in media inviting applications for advance registration for an upcoming project namely 'Our Homes', Sector 37C, Gurugram, Haryana and the complainant made an application for booking of a residential apartment in the above project. On the demand of the respondent, the complainant made payment of Rs.1,64,944/- through cheque dated 04.09.2012 at the time of booking the apartment.
8. The complainant submitted that apartment no.997 on 9th floor, block/tower 'Iris' having carpet area of 48 sq. mtrs. with an



exclusive right to use one car parking, has been allotted to the complainant.

9. The complainant submitted that the respondent has failed to deliver the possession as per clause 3 of the buyer's agreement, the possession of the said apartment was to be delivered by the seller to the purchaser within 36 months from the date of execution of this agreement /construction but despite the elapse of 6 months grace period, the respondent has failed to deliver the possession to the complainant till date.
10. The complainant submitted that the basic sale price of the above unit is Rs.16,00,000/- and the complainant had paid an amount of Rs.15,71,958/- through different cheques and demand drafts to the respondent and in this regard, the respondent has issued the acknowledgement receipts.
11. The complainant submitted that only the rough structure is standing there in poor/damaged condition and no progress has been done till date. It is apparent that the respondent has provided deficient services and is guilty of unfair trade practices and have planned to fleece the complainant of their hard-earned money in a well-directed and pre-planned manner. On the other hand, the complainant is suffering additional loss because of blocked capital of a very heavy amount for no fault of her.

ISSUES RAISED BY THE COMPLAINANT:

12. The following issues are raised by the complainant:

- i. Whether the respondent has violated the terms and conditions of the apartment buyer's agreement dated 09.03.2013?
- ii. Whether the complainant is entitled for possession of the apartment?

RELIEF SOUGHT:

13. The complainant is seeking the following relief:

- i. To direct the respondent to deliver the physical possession of the apartment no.99 on 9th floor, tower 'Iris' having a carpet area of approx. 48 sq. mtrs. with an exclusive right to use one (covered/open) car parking space in the said project.
- ii. Direct the respondent company to pay interest at the prescribed rate for every month of delay till the offer of possession of the said apartment.

RESPONDENT'S REPLY:

14. 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.

15. The respondent submitted that the respondent is very well committed to the development of the real estate and has even applied for the occupation certificate which is awaited and expected to be availed very shortly. And the delay occasioned in 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.
16. 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 and finally the same has been received on 28.04.2019 and the respondent is duty



- bound to deliver the possession of the project within the permissible time.
17. 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 and the fresh application is still pending and the said fact even lead to further operational obstacles and restrictions of funds in completion of the project and leading to delay in completion of the project.
18. The respondent submitted that respondent had been trying hard to avail all the approvals, permissions and sanctions from the relevant authorities and discharging the additional costs of renewal of license, plans and sanctions. Had the approvals and license be granted in time, the respondent would have duly completed the project within the permissible time.
19. 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 even started offer of possession for fit outs in the flats in first phase. The license stands renewed and the OC and RERA registration is expected to be availed shortly.

20. 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.

21. 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. More so it is quite evident that the price of the flats in the project has already been fixed in the year 2009 as per policy on the basis of estimated costs but the costs of men and material has only increased manifold. More so, the respondent had to pay higher renewal charges as per the higher EDC charges due to uncontrollable delays.

22. The respondent submitted that despite readiness and willingness of the respondent in completing the project in a timely manner, there have been various allottees who had been making defaults in payments as called by the respondent leading to financial arrangements for carrying on the [project in a timely manner. The above noted factors being out of control of the respondent, despite all reasonable and probable arrangements collectively led to the delay in the project and the delay is beyond condonation and neither intentional nor deliberate.
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 **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 grace period of 6 months is allowed to the respondent due to exigencies beyond the control of the respondent. 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 3 months and 9 days till the date of decision i.e. 11.09.2019.

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.
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. As per clause 3(a) of apartment buyer's agreement dated 09.03.2013 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. As such, the complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.35% 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:

31. 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 interest at the prescribed rate of 10.35% per annum on the amount

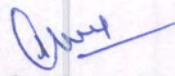
deposited by the complainant with the promoter from the due date of possession i.e. 02.06.2017 up to the date of offer of possession.

- ii. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.
- iii. Complainant shall pay the 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 to sell.
- v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.35% by the promoter which is the same as being granted to the complainant in case of delayed possession.

32. Complaint stands disposed of.

33. File be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority

Dated: 11.09.2019

Judgement uploaded on 12.10.2019