

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

Complaint no. : 1404 of 2019
First date of hearing: 20.08.2019
Date of decision : 20.08.2019

Mrs. Nishi Kapoor
R/o 631, Sector-7, U.E,
Gurugram

Complainant

Versus

M/s Apex Buildwell Pvt. Ltd.
Regd. Office: 14A/36, W.E.A,
Karol Bagh, New Delhi-110005
Also at: Plot no.25B, 2nd floor,
Sector 32, Gurugram

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sushil Yadav
Shri Sandeep Choudhary

Advocate for the complainant
Advocate for the respondent

ORDER

1. A complaint dated 28.03.2019 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mrs. Nishi Kapoor, against the promoter M/s Apex Buildwell Pvt. Ltd., on account of violation of the clause 3(a) of the apartment

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buyer's agreement executed on 16.06.2013 in respect of apartment number 543, 5th floor, block/tower 'orchid' in the project 'Our Homes' for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the apartment buyer's agreement has been executed on 16.06.2013 i.e. prior to the commencement of the Act *ibid*, 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 statutory obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -

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|----|----------------------------------|--|
| 1. | Name and location of the project | "Our Homes", Sector 37-C, Gurugram |
| 2. | Nature of the project | Affordable group housing project |
| 3. | Project area | 10.144 acres |
| 4. | RERA registered/ not registered. | 40 of 2019 |
| 5. | DTCP license | 13 of 2012 dated 22.02.2012 |
| 6. | Apartment/unit no. | 543, 5 th floor, block/tower 'orchid' |
| 7. | Apartment measuring | 48 sq. mtrs. of carpet |

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| | | area |
| 8. | Date of execution of apartment buyer's agreement | 16.06.2013 |
| 9. | Payment plan | Construction linked plan |
| 10. | Total consideration as per statement of account dated 31.05.2018 | Rs.16,00,000/- (page no.48 of complaint) |
| 11. | Total amount paid by the complainant till date as per statement of account dated 31.05.2018 | Rs. 15,22,472/- |
| 12. | Sanction of building plans | 07.05.2013 |
| 13. | Consent to establish granted on | 02.12.2013 |
| 14. | Due 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 i.e. 02.12.2013) | 02.06.2017 |
| 15. | Delay in handing over possession till date of decision i.e. | 2 years 2 months and 18 days |
| 16. | Penalty clause as per clause 3(c)(iv) of apartment buyer's agreement dated 16.06.2013 | Clause 3(c)(iv) of the agreement i.e. Rs.10/- per sq. ft. per month of the carpet area of the said apartment for the period of 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 is available on record for the aforesaid apartment

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delivered by 02.06.2017. Neither the respondent has delivered the possession of the said apartment as on date to the purchaser nor they have paid any compensation @ Rs.10/- per sq. ft. per month of the carpet area of the said apartment for the period of such delay as per clause 3(c)(iv) of apartment buyer's agreement duly executed between the parties. 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 respondent through its counsel appeared on 20.08.2019. The case came up for hearing on 20.08.2019. The reply filed on behalf of the respondent has been perused by the authority.

Facts of the complaint

6. The complainant submitted that the respondent gave advertisement in various leading newspapers about their forthcoming project named "OUR HOMES", Sector 37C, Gurgaon promising various advantages, like world class amenities and timely completion/execution of the project etc.

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Relying on the promise and undertakings given by the

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respondent in the aforementioned Nishi Kapoor, booked an apartment/flat admeasuring 48 sq. mtrs. in aforesaid project of the respondent for total sale consideration is Rs.1600000/- which includes BSP, car parking, IFMS, Club Membership, PLC etc.

7. The complainant made payment of Rs. 1522472/- to the respondent vide different cheques on different dates, the details of which are as annexed.
8. As per flat buyer's agreement the respondent had allotted a unit/flat bearing no.543, on 5^h floor, in tower-orchid having super area of 48 sq. mtrs, to the complainant. That as per para no.3(a) of the apartment buyer's agreement, the respondent had agreed to deliver the possession of the flat within 36 months from the date of commencement of construction with an extended period of 06 months.
9. The complainant submitted that it could be seen that the construction of the project in which the complainant flat was booked with a promise by the respondent to deliver the flat by 16.12.2016 but was not completed within time for the reasons best known to the respondent; which clearly shows

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that ulterior motive of the respondent was to extract money from the innocent people fraudulently.

10. The complainant visited the site but are shocked to see that no construction was going on then the complainant contacted the respondent about the project but the respondent did not gave any satisfactory answer to the complainant.
11. The complainant submitted that due to this omission on the part of the respondent the complainant has been suffering from disruption on her living arrangement, mental torture, agony and also continues to incur severe financial losses. This could be avoided if the respondent had given possession of the flat on time. As per clause 3 (C) iii of the flat buyer agreement dated 16.06.2013 it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainant a compensation @ Rs.10/- per sq. ft. per month of the super area of the apartment/flat. It is however, pertinent to mention here that a clause of compensation at such of nominal rate of Rs.10/- per sq. ft per month for the period of delay is unjust and the respondent has exploited the complainant by not providing the possession of the flat even



after a delay from the agreed possession plan. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the respondent has incorporated the clause in one sided buyer's agreement and offered to pay a sum of Rs.10/- per sq. ft. for every month of delay. If we calculate the amount in terms of financial charges it comes to 18% per annum interest on delayed payment.

12. On the ground of parity and equity the respondent also be subjected to pay the same rate of interest hence the respondent is liable to pay interest on the amount paid by the complainant @18% per annum to be compounded from the promise date of possession till the flat is actually delivered to the complainant.
13. The complainant has requested the respondent several times on making telephonic calls and also personally visiting the office of the respondent either to deliver 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. Thus, the

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respondent in a pre-planned manner defrauded the complainant with his hard-earned huge amount and wrongfully gain himself and caused wrongful loss to the complainant.

Issues to be decided:

14. The issues relevant for the disposal of the complaint are as follows:
- i. Whether the respondent /firm is not completing the construction. It could be seen here that the respondent has incorporated the clause is one sided buyer agreement which is unjustified?
 - ii. Whether flat has not been handed over to the complainant till today and there is no reasonable justification for the delay?
 - iii. Whether The interest cost being demanded by the respondent/developer is very higher i.e.18% which is unjustified and not reasonable?

Reliefs sought:

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15. The complainant is seeking the following reliefs (as per amendment to the complaint):
- i. Direct the respondent to handover the possession of the flat along with prescribed interest per annum from the promised date of delivery till the actual possession of the flat is delivered to complainant;
 - ii. Any other relief which this hon'ble authority deems fit and proper may also be granted in favour the complainant.

Respondent's reply

16. The respondent submitted that the respondent is very well committed to the development of the real estate project and the delay being occasioned for delivering the possession of the project as a whole is only because of explainable and excusable causes beyond the control of the respondent. 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 07.05.2013 and the consent to establish by the Office of Haryana State Pollution Control

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Board, Panchkula was only granted on 02.12.2013. 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 Director General Town & Country Planning, Haryana which is yet to be received despite best efforts of the respondent.

17. The respondent submitted that the provisions of Real Estate (Regulation and Development) Act, 2016 came into force on 28.07.2017 for which the respondent duly filed an application dated 28.08.2017 and due to lapse of license no. 13 of 2012, the same got dismissed vide orders dated 19.01.2018 leading to further operational obstacles in completion of the project.
18. The respondent is trying hard to avail all the approvals, permissions and sanctions from the relevant authorities. The respondent submitted that had the approvals and license be granted in time, the respondent would have duly completed the project within the permissible time period by May 2017.

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19. The respondent submitted that the delay being occasioned is beyond the control of the respondent i.e. firstly due to the grant of consent to establish and thereafter due to the lapse of license and the same is excusable as contemplated and agreed by the parties vide clause 3(b)(i) and (ii) of apartment buyer's agreement executed between the parties and the agreed period of 36 months plus 6 months grace period is extendable and the complainant is estopped from filing the present complaint. The respondent submitted that it is the respondent who is suffering due to the delay that is being occasioned and has to face extra charges for renewal of license and permissions and other costs and expenses.
20. The respondent submitted that the complainant does not have any real cause of action to pursue the present complaint and the complainant has filed the present complaint only to harass the respondent builder and gain wrongfully.
21. The respondent further submitted that the complainant is estopped from filing the present complaint as she has defaulted in making payments in timely manner which is sine qua non of the performance of the obligations by the

respondent. This default has led to multiple problems to the respondent company and extra costs being incurred by the respondent.

22. The respondent further submitted that they are committed to complete the said project and the delay is neither intentional nor deliberate but beyond the control of the respondent and due to extraneous circumstances. First, the respondent could get the consent to establish from HSPCB only on 02.12.2013 due to which the construction could not be started and upon receiving, the construction work has been duly carried out. Thereafter, there had been labour and material shortages affecting the industry as a whole, there had been stoppage to construction activity by the orders of NGT. Thereafter, license bearing no. 13 of 2012 got expired on 22.02.2016, the respondent being duty bound has filed an application for renewal of application way back on 11.02.2016 along with renewal fees of Rs.10,00,000/-. However, due to policy issues the license could not be renewed so far.

23. 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 licence fees for renewal of licenses and other plans. More so, it is quite evident that the price of the apartments in the project had already been fixed in the year 2009 as per the policy on the basis of estimated costs but the costs of men and material has only increased manifold and the respondent company has been suffering immense loss of margins due to delay so occasioned without there being any compensation to the respondent company. More so, the respondent company had to pay higher renewal charges as per the higher EDC charges due to the uncontrollable delays. Thereby, the suffering of the respondent company is manifold and the developer margins are shrinking on every account and on the

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other hand, taking advantage of the precarious situation of the respondent company, complainant has filed the present complaint to harass the respondent company and to gain wrongfully and avoid interest payments against the outstanding amounts.

24. The respondent submitted that though the said project is going behind schedule of delivery, however the respondent has throughout conducted the business in a bona fide manner and the delay occasioned had been beyond the control of the respondent and due to multifarious reasons and given the agreed terms between the parties, 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 issue wise findings of the authority are as under:

25. With respect to the **all issues** raised by the complainant, as per clause 3(a) of apartment buyer's agreement dated 16.06.2013, the possession of the said apartment was to be

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handed over within 36 months from the date of commencement of construction (with a grace period of 6 months) upon receipt of all project related approvals. In the present case, the consent to establish was granted to the respondent on 02.12.2013. Therefore, the due date of handing over possession will be computed from 02.12.2013. The clause regarding the possession of the said unit is reproduced below:

"3(a) offer of possession

...the Developer proposes to handover the possession of the said flat within a period of thirty-six (36) Months with grace period of 6 Months, from the date of commencement of construction upon receipt of all project related approvals including sanction of building plan/ revised plan and approvals of all concerned authorities including the fire service department , civil aviation department , traffic department , pollution control department etc. as may be required for commencing, carrying on and completing the said complex subject to force majeure, restraints or restriction from any court/authorities...."

26. Accordingly, the due date of possession was 02.06.2017 and the possession has been delayed by 2 years 2 month and 18 days till the date of decision. Thus, the respondent has failed in handing over the possession of the apartment in question on or before the said due date, thereby breaching the terms

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and conditions stipulated in the apartment buyer's agreement.

27. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. per month of the carpet area of the said apartment for any delay in offering possession of the unit as per clause 3(c)(iv) of apartment buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided. It has also been observed 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."

28. The possession of the apartment was to be delivered by 02.06.2017, 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. The complainant made a submission before the authority under section 34(f) to ensure compliance/ obligations cast upon the promoter as mentioned above. 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 its obligation.

29. 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 complainant, at the prescribed rate, for every month of delay till the handing over of possession. Therefore, as per section 18(1) proviso read with rule 15 of the Rules *ibid*, the complainant is entitled to prescribed rate of interest i.e. State Bank of India highest marginal cost of lending rate plus two percent, per annum.

Findings of the authority

30. **Jurisdiction of the authority-** 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

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compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

31. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter under section 11(4)(a) of the Act *ibid*. 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.
32. It has been stated at bar by counsel for the respondent that the project is registered with authority. Besides this there is improvement w.r.t. renewal of licence there is hope at the end of year that the project is completed very soon. However, complainant is entitled for delay possession charges.

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33. As per clause 3(a) of the agreement dated 16.06.2013 for unit no. 543, 5th floor, tower-orchid, in project "Our Homes" Sector 37-C, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of consent to establish granted on 02.12.32013. Hence the due date of delivery of possession comes out to be 02.06.2017. However, the respondent has not delivered the unit in time. Complainant has already paid Rs. 15,22,472/- to the respondent against a total sale consideration of Rs. 16,00,000/-. As such, the complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f 02.06.2017 as per the provisions of section 18(1) of the real estate (regulation and development) Act, 2016 till offer of possession.

Decision and directions of the authority

34. 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

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the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent is directed to pay the interest at the prescribed rate i.e. 10.45% for every month of delay from the due date of possession i.e. 02.06.2017 till the offer of possession.
- (ii) The respondent is directed to pay interest accrued from 02.06.2017 to 20.08.2019 on account of delay in handing over of possession to the complainant within 90 days from the date of decision and subsequent interest to be paid by the 10th of each succeeding month.
- (iii) Complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- (iv) The promoter shall not charge anything from the complainant which is not part of the BBA.
- (v) Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

35. The order is pronounced.

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36. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 20.08.2019

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