

BEFORE S.C. GOYAL, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

Complaint No. : CR/4468/168/2018
Date of Decision : 28.01.2020

Ms Neelam Tuteja
R/o B-35, First Floor, Ferozeshah Kotla
Vikram Nagar, New Delhi-110002

Complainant

V/s

M/s Ramprastha Promoter & Developers Pvt Ltd.
R/o 114, Sector-44, Gurugram

Respondent

Argued by:

For Complainant

Ms. Priyanka Aggarwal, AR

For Respondent

Mr. Dheeraj Kapoor, Advocate

ORDER

This is a complaint under section 31 of the Real Estate(Regulation and Development) Act, 2016 (hereinafter referred to Act of 2016) read with rule 29 of the Haryana Real Estate(Regulation and Development) Rules, 2017(hereinafter referred as the Rules of 2017) filed

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by Ms Neelam Tuteja seeking refund of Rs.81,52,062/- deposited with the respondent for booking of a flat/unit no 301, Third Floor, Tower-B in its project known as “**The Edge Tower**” in Sector 37-D, Gurugram on account of violation of obligations of the promoter under section 11(4)(a) of Real Estate (Regulation and Development) Act, 2016. Before taking up the case of the complainant, the reproduction of the following details is must and which are as under:

Project related details		
I.	Name of the project	“The Edge Tower”
II.	Location of the project	Sector-37-D, Gurugram, Haryana
III.	Nature of the project	Residential (construction link plan)

Unit related details		
I V .	Unit No. / Plot No.	301, 3 rd Floor, Tower P
V .	Tower No. / Block No.	Tower P
V I	Size of the unit (super area)	1675 sq.ft
V I I	Size of the unit (carpet area)	-DO-
V I I I	Ratio of carpet area and super area	-DO-

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I X	Category of the unit/ plot	Residential
X	Date of booking	27.09.2012(Annexure P-4)
X I I	Date of execution of BBA (copy of BBA be enclosed as annexure 7)	29.11.2014
X I I	Due date of possession as per BBA	31.12.2018
X I I I	Delay in handing over possession till date	More than seven years
X I V	Penalty to be paid by the respondent in case of delay of handing over possession as per the said BBA (Annexure P-7)	As per clause 15 of ABA
Payment details		
X V	Total sale consideration	Rs. 93,59,923/-
X V I	Total amount paid by the complainant till date	Rs. 81,52,062/-

2. It is the case of the complainant that she booked a residential flat measuring 1675 sq ft in the project of respondent known as "The Edge Tower" located in Sector -37-D, Gurugram, Haryana on 29.11.2012 for a total sale consideration of Rs.93,59,923/-. An Apartment Buyer Agreement (annexure P-7) was executed between the parties on 29.11.2012 and as per the same, the possession of the allotted unit was to be delivered to the complainant by December, 2012 It is also her case that she made various payments totalling Rs.81,52,062/- with the respondent. Though the time for

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possession of the allotted was extended for a period of six months but that period has also expired on 31.12.2012. Despite that the respondent failed to offer the possession of the allotted unit to her. A number of oral as well as written reminders annexure A-12 to A-18 and A-20 were sent to the respondent but with no positive result. It is also her case that in between, the respondent extended the date of possession of the allotted unit initially upto December 2017 and lastly upto September, 2018. Since the possession of the allotted unit was not offered to the complainant despite extension of period for the same, so, she was left with no other alternative but to file a complaint seeking refund of the amount deposited besides interest and other charges.

3. But the case of the respondent as set up in the reply is that though the complainant booked a unit in its project mentioned above but it was denied that she was promised to hand over possession of the same by December, 2012. It was denied that the complainant has been making payment regularly and did not commit default in the same. In fact, the complainant alongwith other allottees is defaulter and did not deposit the amount due with the respondent. Despite that the respondent continued with the construction of the project in which the unit of the complainant is located and also completed the construction of the project and applied for getting an occupation certificate which is likely to be issued soon. Moreover, the respondent has already made a declaration in terms of Section 4(2)(1) (c) of Real Estate (Regulation and Development) Act, 2016 for completion of the project by 31.12.2019 and it had already extended by the learned Authority. Then, it is also provided in the Apartment Buyer's Agreement (annexure P-7) that in case the respondent fails to offer possession of the apartment within a committed period, then it shall pay delayed possession charges @ Rs.5 per sq ft per month of the super area and the complainant is

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bound by the terms and conditions of the same. It was also pleaded that due to certain circumstances beyond the control of the respondent, the construction of the project could not be completed.

4. Various preliminary objections were also taken with regard to cause of action and the complainant to file an amended claim petition, maintainability of the claim petition in the present form before this forum and the same being false and frivolous.

5. After hearing both the parties and perusing the case file, the learned Authority vide its order dated 21.09.2018 disposed of the complaint and directed the respondent to pay delayed possession charges to the complainant from the due date of possession till the committed date besides paying interest accrued from 31.12.2018 till the date of handing over the possession of the allotted unit within a period of 90 days. Feeling aggrieved with the same, the respondent filed an appeal before the Hon'ble Appellate Tribunal and who vide orders dated 24.07.2019 set aside that order and directed this forum to decide the complaint filed by the complainant afresh in accordance with law besides giving an opportunity to the parties to amend the pleadings in order to bring the same in conformity with rule 29 of the Haryana Real Estate(Regulation and Development) Rules, 2017.

6. In pursuance to directions passed the Hon'ble Appellate Tribunal, both the parties filed amended pleadings and reiterated their earlier pleas. An additional plea was taken by the respondent with regard to maintainability of the complaint before this forum after amendment of Rules, 2017 w.e.f. 12.09.2019.

7. I have heard the learned counsel for both the parties and who reiterated their position as stated above.

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8. Some of the admitted facts of the case are that the complainant booked a residential unit bearing No.301, 3rd floor, Tower P in the project of the respondent known by the name of "The Edge Tower" situated in Sector 37-D, Gurugram, Haryana on 27.09.2012 and issued a allotment letter(copy annexure P-4) for a total sale consideration of Rs.93,59,923/-. An Apartment Buyer Agreement Annexure P-7 was executed between the parties on 29.11.2012. The complainant started depositing payment towards the allotted unit and deposited a total sum of Rs.81,52,062/- with the respondent. The allotted unit of the complainant was to be constructed under a construction linked payment plan. A perusal of clause 15 of Annexure P-4 shows that possession of the allotted unit was to be delivered to the complainant by 31.08.2012 with a grace period of 120 days i.e. 30.12.2012. So, there is delay of more than 7 years in completion of the project and handing over its possession to the complainant by the respondent. It is the case of the complainant that the allotment of the residential unit was made by the respondent under the construction linked payment plan and she paid a sum of Rs.81,52,062/- on different dates. But despite that the respondent failed to offer possession of the allotted unit to the complainant. Moreover, a period of more than 7 years has expired and the tentative date of delivery of possession of the allotted unit has been mentioned as the year 2020. So, in such a situation, the complainant is entitled to seek refund of the amount deposited with the respondent besides interest. Reliance in this regard has been made to the ratio of law laid down in case of **Mrs Deepa Rajwani and Anr. Vs Ramprastha Promoters and Developers Pvt Ltd.** bearing complaint no. 113/2019 and decided on 26.08.2019 by the Hon'ble State Commission, Delhi wherein refund of the deposited amount was allowed to the complainants with interest to be paid within two months. Thus, it has been argued on behalf of the

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complainant that when there is inordinate delay in handing over possession of the allotted unit to the complainant, then she is entitled to seek refund of the amount deposited besides interest and compensation.

9. But on the other hand, it has been argued on behalf of the respondent that though the pleas of the complainant for delayed possession charges and interest accrued after the due date were allowed by the learned Authority vide orders dated 21.09.2018 but that order was set aside by the Hon'ble Appellate Tribunal. A direction was given to this forum to proceed further in accordance with law. So, in pursuance to those directions, the complainant filed an amended complaint in conformity with rule 29 of Rules, 2017 on 11.11.2019. However, the complaint filed in this regard is not maintainable. Secondly, the complainant was allotted a residential unit under the construction linked payment plans. She alongwith various other allottees committed default in making payment. Despite crunch of funds and various other factors such as short of supply of construction material, shortage of labour, restraint orders passed by the Hon'ble Punjab & Haryana High Court directing the respondent not to extract ground water, the construction of the project has been completed and it has applied for occupation certificate on 19.07.2019. Thirdly, the complainant is a speculative investor who had a motive and intent to make quick profit from the sale of the said apartment through the process of allotment. Since, she failed to re-sell that apartment due to recession, so she could not make payment of the amount due in time and filed this complaint on frivolous grounds. Lastly, the project of the respondent is complete and after having applied for an occupation certificate, an order of refund can not be passed as the basic purpose of the Act, 2016 is to encourage the real estate activities

and not to discourage the same. If refund of the deposited amount is
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allowed, then the very purpose of the Act of 2016 would be defeated and the project of the respondent like other projects would collapse creating chaotic situation in the real estate sector.

10. The first limb of arguments advanced on behalf of the respondent is with regard to maintainability of the complaint post amendment of rules. It is pleaded that after the amendment of rules w.e.f. 12.09.2019, the complaint filed before this forum is not maintainable and it can only be filed after an inquiry is conducted by the learned Authority as per rule 28(2). It is also pleaded that as per rule 29 of the amended rules, the relief for refund and compensation can only be adjudicated once an inquiry has been conducted by the Authority in terms of rule 28. Though the complainant filed an amended complaint as per direction of the Hon'ble Appellate Tribunal but the same is not maintainable in view of amended rules. Even a number of cases pending before this forum for refund of the amount deposited by various allottees were disposed of and a direction was given for transfer of those complaints with the Registry for further action. The amended rules are prospective in nature and as per law, the amended complaint can only be filed before the Authority and not before this forum. Reliance in this regard has been placed on the ratio of law laid down in cases of Manohar Damecha Vs Lavasa Corporation Limited III(2016)CPJ3189(NC), G.I Raja Vs Tejraj Surana Manu/SC/1002/2019 and G.I Raja Vs Tejraj Surana SPL(Cr) No.3342/2019 decided on 15.04.2019 wherein it was held that is that unless contrary intention appears, a legislative is presumed not to be intended to have a retrospective operation. There is no dispute about the ratio of law laid down in the above mentioned cases. However, the complaint filed by the complainant seeking refund of the amount deposited with the respondent with regard to allotted unit is very much maintainable. Firstly, the amended rules of 2019 came into force w.e.f. 12.09.2019 and the amended complaint was

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filed on the directions of the Hon'ble Appellate Tribunal on 11.11.2019. Secondly, the filing of an amended complaint is continuation of the previous complaint filed before the Authority as the case **was transferred** to this forum. Thirdly, as per rule 5(3) of General Clause Act, 1897 any enactment/statue have a perspective effect unless and until as stipulated in the statue and not retrospective effect. There is nothing in the enactment of 12.09.2019 which provides that the same shall have retrospective effect. A reference in this regard may be made to ratio of law laid down in cases of Keshavan Madhava Menon Vs State of Bombay, AIR 1951 SC 128, Commissioner of Income Tax, Orissa Vs Dhadi Sahu (1992) SCR 3 168, Monnet Ispat & Energy Vs Union of India & Ors (2012) 11 SCC 1, Videocon International Ltd Vs Securities and Exchange Board of India,(2015) 4 SCC 33 and Securities and Exchange Board of India Vs Classic Credit, 2017 SCOnline SC 961 and wherein it was held that it is a cardinal principle of construction that every statute is *prime facie* prospective unless, it is expressly or by necessary implication made to have a retrospective operation. The legal maxim 'Nova constitution furturis forman imponere debet non practeritis', i.e. a new law ought to regulate what is to follow, not the past. Moreover, it is well settled that the law which affects a change in the forum is not applicable to the pending action or proceedings unless, the intention to the contrary is clearly shown. Though the complainant sought refund of the amount deposited with the respondent but despite that the complaint was disposed of on 21.09.2018 with a direction to pay delayed possession charges at the prescribed rate of interest i.e. 10.45% p.a. besides paying interest accrued thereon from 31.12.2018 upto the date of handing over the possession within a period of 90 days. That order was challenged before the Hon'ble Appellate Tribunal by the respondent and who vide orders dated

24.07.2019 allowed the same with following observations:

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The order passed by this Tribunal and observations of the Id Authority in the impugned order will not prejudice the mind of the Id Adjudicating Officer qua rights of the parties on the merits of the case. The case is sent to the Adjudicating Officer, Gurugram for deciding the complaint filed by the respondent/allottee afresh in accordance with law. The Id Adjudicating Officer will allow the parties to amend their pleadings to bring it inconformity with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017.

11. In pursuance of above mentioned orders passed by the Hon'ble Appellate Tribunal, the complainant filed an amended complaint with this forum on 11.11.2019. The main plea advanced on behalf of the respondent that in view of the amendments made in the rules by the State Government, the complaint filed by the complainant before this forum is not maintainable and the same being premature is liable to be dismissed. Though, he referred to a number of cases detailed above but the question for consideration arises whether the procedural amendment made in the law applies retrospectively or prospectively. A reference in this regard may be made to the provision of Rule 5(3) of the General Clause of 1897 which provides that any enactment of the statute shall have a prospective effect until and unless as stipulated in the statute. A perusal of the notification dated 12.09.2019 shows that the same came into effect from the date of publication in the Official Gazette on 12.09.2019 and it is nowhere provided that the same shall have a retrospective. In case of Keshavan Madhava Menon Vs. State of Bombay and others(supra), it was held by the Hon'ble apex court of the land every statute is prime facie prospective unless, it is expressly or necessary implication made to have a retrospective operation. Lastly, in case **Neel Kamal Realtors Pvt Ltd & Anr Vs Union of India and others 2018(1)(Civil) 298(DB)**, it was held by the Hon'ble Bombay

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High Court that provisions of the Act of 2016 are retroactive in operation. The same view was taken by the Hon'ble Appellate Tribunal in case **Magic Eye Developers Pvt Ltd Vs Ishwar Singh Dahiya Appeal No.A 173 of 2019** decided on 17.12.2019. So, taking into consideration all these facts and the law of the land, this forum has very much jurisdiction to adjudicate this complaint received from the Hon'ble Appellate Tribunal and the same is very much maintainable.

12. The second plea advance on behalf of the respondent is that the complainant admittedly booked a residential unit under construction linked payment plan on 29.11.2012. An Apartment Buyer Agreement was executed between the parties on 29.11.2012. And as per clause 15 of that document, the possession of the allotted unit was to be handed over to the complainant by 31.08.2012 with a grace period of six months. The complainant executed that document on 29.11.2012 fully knowing its implications and the fact the time for delivery of the allotted unit is going to expire shortly i.e. by December, 2012. So, now she cannot say that she was not offered possession of the allotted unit within the stipulated period. Then, due to various factor such as delay in making payment by the complainant as well as other allottees, crunch of funds, short supply of construction material, labour, non-extraction of ground water and various restrained orders passed by the Hon'ble Punjab & Haryana High Court, the construction of the project in which the complainant was allotted a unit could not be completed. Moreover, the complainant is a speculative investor who had a motive and intent to make quick profit from the allotment of apartment through the process of sale of that unit since she had failed to resell that apartment due to recession, so, she could not make

payment of the amount due and moved this forum for seeking refund

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on frivolous grounds. But again, the plea advanced in this regard is devoid of merit. No doubt, the complainant was allotted a residential unit on 27.09.2012 though time for completion of the project has already expired on 31.08.2012 but the grace period for that purpose was to expire on 31.12.2012. Since, the residential unit was allotted under the construction linked payment plan and the complainant had already deposited a sum of Rs.81,52,062/- upto 10.12.2012 out of total sale consideration of Rs.93,58,923/- besides paying Rs.93,954/- on 12.01.2017, so it cannot be said that she was defaulter alongwith other allottees and which led to delay in completion of the project. There may be certain other circumstances just as crunch of funds, shortage of construction material, labour and various orders passed by the Punjab & Haryana High Court but that cannot said to be a hindrance in completion of the project and particularly when the same was to be completed as per clause 15 of Apartment Buyer Agreement by 31.08.2012 with a grace period of 120 days i.e. by 31.12.2012. In cases, of **Pioneer Urban Land & Infrastructure Ltd. Vs. Govindan Raghvan & Ors. 2019(2) RCR (Civil) 738 decided on 02.04.2019** by the Hon'ble apex court, **Shalabh Nigam Vs. Orris Infrastructure Pvt Ltd and Anr. in Consumer Case No. 1702/2016 decided on 06.05.2019** by Hon'ble National Consumer Disputes Redressal Commission, New Delhi and **Marvel Omega Builders Pvt Ltd and Anr. Vs. Shrihari Gokhale and Anr. in Civil Appeal No. 3207-3208 of 2019 decided on 30.07.2019** rendered by the Hon'ble Apex Court of the land, it was held that when the respondent/builder failed to complete the project in time and deliver the possession of the allotted unit to the complainant as per the allotment letter or the apartment

buyer agreement, then the allottee has a right to ask for refund, if the

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possession is inordinate delayed. So, the plea of the respondent that due fault of the complainant, the construction of the project and the allotted unit could not be completed is untenable.

13. It is also pleaded on behalf of the respondent that Apartment Buyer Agreement was executed between the parties on 29.11.2012 and the same was signed by the complainant out of her free will and consent. So, the court should be slow to interfere in its genuineness. Reliance in this regard has been placed on the ratio of law laid down in cases of **Rasheed Ahmad Usmani and Ors. Vs. DLF Ltd. and Ors. MANU/CF/0411/2019** decided on 02.07.2019 and **Pioneer Urban Land and Infrastructure Limited & Ors Vs Union of Indian & Ors , (supra)** and wherein it was held that the consent given by a person shall be deemed to be a free and would be binding on the parties to the contract unless it is shown by such person use of coercion, undue influence, fraud, mis-representation, mistake or duress when he signed that contract/settlement under those circumstances. Neither from the pleadings nor from any other document, it is evident that the complainant signed the Apartment Buyer Agreement under inducement, coercion or force. So, in such a situation, the complainant cannot wriggle out from the terms and conditions of ABA Annexure P-7 and the same are binding upon her. But again the plea advanced in this regard on behalf of the respondent is devoid of merit. In case of **Central Inland Water Transport Corporation Limited and Ors Vs. Brij Nath Ganguly and Ors. (1986) 3SCC 156**, a contrary view was taken by the Hon'ble Apex Court of the land and observed as under: -

“.... Our judges are bound by their oath to ‘uphold the Constitution and the laws’. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of

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the Constitution guarantees to all persons equality before the law and equal protection of the laws. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties, who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can, visualize the different situations which can arise in the affairs of man. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form, or to accept a set of rules as part of the contract, however, unfair unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction These cases can neither be enumerated nor fully illustrated. This court must judge each case on its own facts and circumstances" A similar view was taken by a

Division Bench of the Hon'ble Bombay High Court in case Neel Kamal
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Realtors Suburban Pvt. Ltd. & anr. Vs. Union of India and others (supra) and held that “**agreements entered into which individual purchasers are invariably one sided, standard-format agreements prepared by the builders/developers and which are 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.**” So, the plea advanced in this regard on behalf of the respondent qua binding effect of Apartment Buyer Agreement between the parties is untenable.

14. Lastly, the respondent took a plea that it has already applied for occupation certificate and is same is likely to be received shortly. So, if there is any delay, then the same should not be attributed to it. Though there is a delay in delivery of possession of the allotted unit to the complainant but the same is ready for occupation. A reference in this regard has been made in letter Annexure-R-7 dated 16.04.2019 whereby the respondent applied with DTCP Haryana, Chandigarh for occupation certificate. So when the construction of the project in which the complainant was allotted a unit is complete and ready for occupation, then in such a situation refund should not be allowed. But again the plea advanced in this regard is devoid of merit. A perusal of the pleadings of the respondent alongwith document Annexure-R7 shows that it applied for part occupation certificate of Group Housing Colony falling in Sector-37-D, Gurugram, Manesar Urban Complex developed by S.A. Infrastructure Pvt. Limited bearing licence No.33-2008(building plan approved) Memorandum No.12 8411 dated

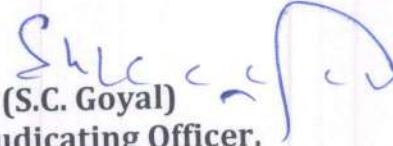
13.8.2009 for the following towers: -

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16. The amount mentioned above shall be paid to the complainant by the respondent within a period of 90 days from the date of this order and failing which legal consequences will follow.

17. File be consigned to the registry.

28.01.2020


(S.C. Goyal)
Adjudicating Officer,
Haryana Real Estate Regulatory Authority
Gurugram

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