

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 05.09.2018
Complaint No.	385/2018 Case titled as Mr. Vishal Kapoor V/s M/S Apex Buildwell Pvt. Ltd & Other
Complainant	Mr. Vishal Kapoor
Represented through	Complainant in person with Shri Karan Govel and Shri Ishaan Mukharjee, Advocate
Respondent	M/S Apex Buildwell Pvt. Ltd & Other
Respondent Represented through	Shri Sandeep Chaudhary, Advocate for the respondent
Last date of hearing	2.8.2018

Proceedings

The project is not registered.

It was brought to the notice of the authority that the project is registerable but so far it has not been registered which is violation of Section 3 (1) of the Real Estate (Regulation & Development) Act 2016. The learned counsel for the respondent has been asked to advise the respondent to do needful at the earliest and this be treated as the notice as to why penal proceedings should not be initiated against the respondent under section 59 for violation of Section 3 (1) of the Act ibid, where under the penalty amount may extend upto 10% of the estimated costs of the Project.

Arguments advanced by the counsel for both the parties have been heard at length. The learned counsel for the respondent has made a statement

that the construction of the project is almost complete and they shall offer the possession of the unit to the complainant by December 2018.

Counsel for the respondent is directed to submit an affidavit regarding date of delivery of possession to the complainant and to pay the prescribed rate of interest w.e.f. 2.6.2017.

The respondents are also directed to get themselves registered with the authority in the new format within 15 days except licence; they shall pay the prescribed rate of interest @ 10.45% from 2.6.2017 till handing over the possession to the complainant; there is delay in handing over possession by December 2018 which is admitted by the respondent. The commencement of work should be treated from the date of grant of consent to establish. The interest accrued from 2.6.2017 to 5.9.2018 on account of delay in handing over possession shall be paid to the complainant within 90 days from today and subsequent interest to be paid by the 10th of every succeeding month.

The complainant has brought to the notice of the authority that quality of the construction is not upto the mark. The allottee may visit the site to ascertain the quality of construction. The counsel for the respondent is also directed to submit a certificate that construction is being carried out according to the Rules and Regulations of Haryana Building Code, 2017 with further direction to file an affidavit regarding payment of EDC, IDC to the competent authorities. As per Section 14 of the Real Estate (Regulation & Development) Act, 2016, the promoter is duty bound to comply the specifications as approved by the competent authorities. The District Town Planner, Gurugram is directed to visit the site alongwith the Superintending

Engineer, Haryana Urban Development Authority, Gurugram to ascertain the quality of construction and, in case, quality of the construction is found to be below standard or not as per the specifications, action will be taken by the them as per the terms and conditions of the licence. The promoter is also directed to carry out the construction as per the approved specifications. In case, it comes to the notice of the authority that quality of construction is not as per the specifications, it will be treated as violation of the directions of the authority and necessary penal proceedings shall be initiated against the promoter.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
05.09.2018

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

Complaint No. : 385 of 2018
First date of hearing: 02.08.2018
Date of Decision : 05.09.2018

Mr. Vishal Kapoor
R/o. 283 Scheme no 3, Basant Vihar,
Alwar, Rajasthan-301001.

Complainant

Versus

M/s Apex Buildwell Pvt. Ltd.
Regd. Office: 14A/36, WEA,
Karol Bagh, New Delhi-110005.

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Mr. Vishal Kapoor Complainant in person
Shri Karan Govel along with
Shri Ishaan Mukharjee Advocate for the complainant
Shri Sandeep Choudhary Advocate for the respondent

ORDER

1. A complaint dated 05.06.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Vishal Kapoor, against the promoter M/s Apex Buildwell Pvt. Ltd., on account of violation of the clause 3(a) of apartment buyer's



agreement executed on 14.02.2013 in respect of apartment no. 782, 7th floor, block/tower- 'Iris' in the project 'Our Homes' for not handing over possession on the due date i.e. 2nd June 2017 which is an obligation 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	"Our Homes", Sector 37-C, Gurugram
2.	RERA registered/ not registered.	Not registered
3.	Apartment/unit no.	782 on 7 th floor, block/tower 'Iris'
4.	Apartment measuring	48 sq. mtr.
5.	Date of execution of apartment buyer agreement	14 th February 2013
6.	Payment plan	Time linked payment plan
7.	Basic sale price	Rs. 16,00,000/-
8.	Total amount paid by the complainant till date	Rs.14,40,000 /-
9.	Percentage of consideration amount	Approx. 90 percent
10.	Date of delivery of possession as per clause 3(a) of BBA (36 months + 6 months grace period from the date of commencement of Construction upon receipt of all approvals)	02 nd June 2017
11.	Consent to establish granted on	02 nd December 2013
12.	Delay in handing over possession till date	1 year 03 months 03 days
13.	Penalty Clause as per apartment buyer agreement dated 14.02.2013	Clause 3(c)(iv) of the agreement i.e. Rs.10/- per sq. ft per month of



		the carpet area of the said flat.
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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 complainant and the respondent. An apartment buyer agreement is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 02nd June 2017. The respondent company has not delivered the possession till 05.09.2018. Neither they have delivered the possession of the said unit 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 flat for the period of such delay as per clause 3(c)(iv) of apartment buyer 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 for appearance. The respondent through his counsel appeared on 02.08.2018. The case came up for hearing on 02.08.2018 & 05.09.2018. The reply has been filed on behalf of the respondent which has been perused. The respondent has supplied the details and status of the project along with the reply. The complainant has



filed a rejoinder dated 30.08.2018 wherein he has re-asserted the contentions raised in the complaint.

Facts of the complaint

5. Briefly stated, the facts of the case of the complainant are that on 31st August 2012, the respondent had published an advertisement in daily national newspaper namely Times of India for the launching of the project namely 'Our Homes' situated at sector 37-C. That relying on the advertisement, the complainant had applied in an affordable housing project under 'Government of Haryana Affordable Housing Scheme' and thus allotted the said unit having a carpet area of 48 sq. mtr. approx. with an exclusive right to use of the apartment together with the proportionate undivided, unidentified, impartial interest in the land underneath with the right to use the common areas and facilities in the said housing complex vide apartment buyer's agreement.

6. The complainant paid booking amount of Rs.1,64,944/- vide cheque dated 14.06.2012. On 10.10.2012, the complainant received allotment letter from the respondent. The apartment buyer agreement was executed on 14.02.2013 wherein the developer agreed to handover possession of the flat within 36 months plus 6 months grace period from the commencement



of construction upon receipt of all approvals and the respondent failed to develop so called project within the said period. The complainant submitted that he has been visiting the project site and it has been noted that the construction of the project is at very slow pace and there is no possibility in near future of its completion. Therefore, the respondent company has cheated and frauded the complainant committing criminal offence of breach of trust and other offences.

7. The buyers filed a complaint before CM window which was forwarded to DTP office. On 09.01.2018, the respondent company replied to District Town Planner, Sector 14, Gurugram and gave his written commitment on affidavit to complete the project and offer possession by 31st December 2018.
8. That the basic sale price was Rs.16,00,000/- and the complainant has paid Rs.14,40,000/- till date. That the complainant has tried to approach the respondent company time and again, but the respondent company has failed to respond to the complainant's queries nor have delivered the possession of the said unit. Further, the complainant has stated that the quality of the construction done by the promoter is also faulty. The sand of the internal walls plaster



came out when the complainant touched it which shows that the intention of the respondent is only to collect money and spend as low as possible on the construction. Since the respondent has not delivered the possession of the apartment, the complainant has been suffering economic loss along with other sufferings. Hence, the complainant has filed the current complaint.

9. Issues raised by the complainants are as follow:

- i. Whether the respondent delayed in handing over the possession of the unit to the complainant?
- ii. Whether the quality of construction/building material is low due to which by touching the wall plaster it's sand comes in hand?
- iii. Whether the complainant is entitled to interest for the unreasonable delay in handing over the possession?

10. **Relief sought:**

The complainant is seeking the following reliefs:

- i. Interest charged by the builder @ 18% p.a. on delayed payment therefore respondent should pay as per below details:
 - a) Respondent should pay same interest 18% p.a. which he charged from consumer as per rolling



interest @ 18% per annum for 7 months (01.10.2017 to 30.04.2018) on amount Rs.14,40,000/- and i.e. Rs.1,51,200/-;

b) The interest @ 18% p.a. on all the paid instalments should be applicable from 01.10.2017 till the actual date of possession offered by the respondent.

- ii. The complainant is seeking compensation of Rs.1,00,000/- for mental agony, harassment and financial losses.
- iii. The complainant is seeking Rs.10,000/- as cost of litigation.

The complainant vide amendment to the complaint dated 01.09.2018 stated that he is not seeking compensation as mentioned in the complaint but amending his complaint and is seeking directions from the authority to the promoter to comply with the obligations.

Respondent's reply

11. The admitted the fact that the project is situated in sector 37-C, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complaint. The respondent company has contended in its reply that the complainant has sought compensation and the same has to be



adjudged by the adjudicating officer under section 71 of the Act and hence the authority does not have jurisdiction to hear the matter. 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. Further, the respondent has contended that the complainant is estopped from filing the present complaint as the complainant himself 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 multiple problems to the respondent company and extra costs being incurred by the respondent.

12. However, the respondent submitted that the construction of the said project is in full swing. That the respondent company is very much committed to develop the real estate project and as on date the status of construction is as under:

- a) Civil structure : Complete
- b) Internal plaster : Complete
- c) White wash : Under Process
- d) Floorings : Under process 68% complete
- e) Electric fittings : Under process 70% complete



The Respondent has scheduled to deliver the possession of the first phase of the project in December 2018 which comprises of 432 flats in 10 towers and complete delivery of 2nd phase by March 2019 comprising of 16 towers having 704 flats.

13. The respondent further admitted that they are behind schedule of completion, but the respondent is not responsible for the delay as the delay occurred is due to extraneous circumstances beyond their control. Further, the respondent could get the consent to establish only on 02.12.2013 due to which construction could not be started. That the license bearing no. 13 of 2012 expired on 22.02.2016, however the company filed an application for renewal of application on 11.02.2016. But, due to policy issues, the license could not get renewed till date and further due to non-renewal of the license, the application for registration with the HRERA, Panchkula could not be allowed and the application of the respondent was rejected as a result of which the bankers are not allowing smooth finances and the respondent company suffered but the company is not letting the same to come in their way of delivering possession.

14. 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 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. The respondent has further contended that the parties are bound by the terms and conditions of the contract and that as per clause 3(a) of the apartment buyer's agreement, the respondent shall handover the possession of the apartment within 36 months with a grace period of 6 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 other approvals.

15. The respondent submitted that clause 3(b) of apartment buyer's agreement enumerates certain situations in which the date of possession shall get extended which states that the completion of the said low cost/ affordable group housing project including the apartment is delayed by reason of non-availability of steel and cement or other building materials or water supply or electric power or slow down, strike or lockout or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of god or due to circumstance beyond the power and control of the developer.
16. 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 and due to multifarious reasons and given the agreed terms between the parties the complainant have 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:

17. With respect to the first issue raised by the complainant, the authority came across that as per clause 3(a) of apartment buyer's agreement, the possession of the flat was to be 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 2.12.2013. Therefore, the due date of handing over possession will be computed from 2.12.2013. 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....”

18. Accordingly, the due date of possession was 2nd June 2017 and the possession has been delayed by one year three months and three days till the date of decision. The delay compensation payable by the respondent @ Rs. 10/- per sq. ft. per month of the carpet area of the said apartment as per clause 3(C)(iv) of builder buyer 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 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.”



19. As the possession of the flat was to be delivered by 02nd June 2017 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.”

20. The complainant 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 complainant 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.

21. With respect to the third issue raised by the complainant, 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 to the complainant interest, 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.

The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

22. With respect to the second issue, the complainant has provided no proof but made only assertion with respect to sub-standard quality of construction in the complaint. However, the authority has issued directions in succeeding para no. 26.

Findings of the authority

23. 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.
24. Keeping in view the present status of the project and intervening circumstances, the authority is of the considered



opinion that the respondent has failed to deliver the possession of the apartment number 782, 7th floor, block/tower- 'Iris' to the complainant by the committed date i.e. 02nd June 2017 as per the said agreement and the possession has been delayed by 1 year 3 months 3 days till the date of decision i.e. 05.09.2018. Thus, the complainant is entitled to interest at prescribed rate for every month of delay till the handing over of the possession. The complainant has made an amendment to the complaint dated 01.09.2018 whereby the complainant intended to continue with the said project and is seeking interest at the prescribed rate for every month of delay till actual date of handing over of possession. Further, the respondent has submitted during the oral arguments that the construction of the project is almost complete and they shall offer the possession of the unit to the complainant by December 2018 and the same was affirmed through an affidavit.

Decision and directions of the authority

25. 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 duty bound to hand over the possession of the said unit by 31st December 2018 as committed by the respondent.
- (ii) The respondent is duty bound 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 actual date of handing over of the possession.
- (iii) The respondent is directed to pay interest accrued from 02.06.2017 to 05.09.2018 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 every succeeding month.
- (iv) The respondent is directed to allow the complainant to visit the project site freely.
- (v) The respondent is further directed to apply for registration of the project within fifteen days from 05.09.2018 otherwise penal consequences will follow.



26. The complaint brought to the notice of the authority that quality of construction is not up to the mark. The allottee may visit the site to ascertain the quality of construction. The

counsel for the respondent is also directed to submit a certificate that construction is being carried out according to the provisions of the Haryana Building Code with further directions to file an affidavit regarding payment of EDC, IDC to the competent authorities. As per section 14 of the Real Estate (Regulation and Development) Act, 2016, the promotor is duty bound to comply with the specifications as approved by the competent authority. The District Town Planner, Gurugram is directed to visit the site along with the Superintendent Engineer, HUDA, Gurugram to ascertain the quality of the construction and in case, quality of construction is found to be of sub-standard or not as per the specifications, action shall be taken against the promotor as per terms and conditions of the license. The promotor is also directed to carry out construction as per approved specifications. In case, it comes to the notice of the authority that quality of construction is not as per specifications, it will be treated as violation of the directions of the authority and necessary penal proceedings shall be initiated against them.



27. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered & for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.

28. The order is pronounced.
29. Case file be consigned to the registry. Copy of this order be endorsed to registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram



HARERA
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