

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 05.09.2018
Complaint No.	387/2018 Case titled as Mr. Shashi Kumar V/s M/S Apex Buildwell Pvt. Ltd & Other
Complainant	Mr. Shashi Kumar
Represented through	Complainant in person with Shri Karan Govel and 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. : 387 of 2018
Date of First
Hearing : 02.08.2018
Date of Decision : 05.09.2018

Mr. Shashi Kumar R/o Rajiv Colony House
no 206 Sapna Hotel Gali, Opp. Marigold
School - 122001

...Complainant

Versus

M/s Apex Buildwell Pvt. Ltd. through its
Directors
Regd. Office at 14A/36, W.E.A. Karol Bagh,
New Delhi 110005
Marketing office at Plot No.25B, 2nd floor
Sector-32, Gurugram

...Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Shashi Kumar Advocate for the complainant
Shri Sandeep Chaudhary 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. Shashi Kumar, against the promoter M/s Apex Buildwell Pvt. Ltd., on account of violation of clause 3(a) of the builder-buyer agreement executed on 22.02.2017 for unit no. 839, 8th floor, tower-‘Lotus’ in the project ‘Our Homes’ for not giving possession on the due date, i.e. 2nd June, 2017 which is an obligation of the promoter 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” in Village Gadoli-khurd, sector 37-C, Gurugram
2.	Unit no.	839, 8th floor, tower-Lotus
3.	Project area	10.144 acres
4.	Registered/ Not registered	Not registered
5.	DTCP license	13 of 2012. License expired on 22.02.2016. Renewal fees submitted but not renewed.
6.	Date of booking	15.02.2017
7.	Date of builder buyer agreement	22.02.2017
8.	Total consideration	Rs. 16,00,000/- (BSP)
9.	Total amount paid by the complainant	Rs. 15,17,625/-
10.	Payment plan	Time linked payment plan
11.	Date of delivery of possession	Clause 3(a) – 36 months from date of



		commencement of construction + 6 months grace period, i.e. 02.06.2017 [Consent to establish granted on 02.12.2013]
12.	Delay of number of months/ years upto 05.09.2018	1 year 3 months
13.	Penalty clause as per builder buyer agreement dated 22.02.2017	Clause 3(c)(iv)- Rs. 10/- per sq. ft. per month

3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A builder buyer agreement is available on record for Unit No. 839, 8th Floor, Tower-Lotus according to which the possession of the aforesaid unit is to be delivered by 02.06.2017. Neither the respondent has delivered the possession of the said unit till 05.09.2018 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's agreement dated 22.02.2017. 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.



Accordingly, the respondent appeared through his counsel on 02.08.2018. The reply has been filed on behalf of the respondent on 23.08.2018. The reply filed on behalf of the respondent has been perused. The respondent has supplied the details and status of the project along with the reply. The respondent has submitted an affidavit wherein the respondent has affirmed that the possession will be delivered to the complainant by 31.12.2018.

Facts of the complaint

5. On 15.02.2017, the complainant booked a unit in the project named "Our Homes" in Village Gadoli-khurd, sector 37-C, Gurugram by paying an advance amount of Rs 1,60,000/- to the respondent. Accordingly the complainant was allotted a unit bearing 839, 8th Floor, Tower-Lotus.
6. On 22.02.2017, builder buyer agreement was entered into between the parties wherein as per clause 3(a), the construction should have been completed within 36 months + 6 months grace period from the date of commencement of construction. However, till date the possession of the said unit has not been handed over to the complainant despite the launch of the project on 31.08.2012 wherein he was assured that 90% project is complete and the project will be delivered



in 8-9 months. The complainant made payments of all instalments demanded by the respondent amounting to a total of Rs 15,17,625/-.

7. The complainant submitted that the license obtained by the respondent expired and has not been renewed. Moreover, on 09.01.2018, the respondent in a reply to the District Town Planner Department, Sector-14, Gurugram gave his written commitment on Affidavit to complete the project and offer possession by 31st December, 2018. This was in reply to another buyer's complaint which was forwarded to the respondent from C M Window to DTP Office for further action.
8. The complainant submitted that despite repeated calls, meetings and requests to the respondent, no definite commitment was shown to timely completion of the project and no appropriate action was taken to address the concerns and grievances of the complainant. Further, the complainant has stated that the quality of the construction done by the promoter is of low quality. 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. The complainant has filed a rejoinder dated 30.08.2018 wherein he has re-asserted the contentions raised in the complaint.

10. **Issues raised by the complainants are as follows:**

- 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 of low quality due to which by touching the wall plaster its sand comes in hand?
- iii. Whether the complainant is entitled to interest for the unreasonable delay in handing over the possession?

11. **Relief sought:**

The complainant is seeking the following relief:

- 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. 15,17,625/- and i.e. Rs.1,53,834/-;

01.10.2017 is the tentative date given by the respondent in his reply to DTP office against home buyers complaint.

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.

Respondent's reply

12. The respondent 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 complainant. 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.

13. 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



14. 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.

15. Respondent further submitted that they are committed to completing 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 2.12.2013 due to which the construction could not be started and upon receiving, the construction work has been duly carried out. The overall industrial climate of the real estate sector had been abysmally low. The availability of skilled manpower and material is also at all time low and their cost has only increased manifold since the launch of the project.

16. It is further submitted that the license bearing no. 13 of 2012 got expired on 22.02.2016, however the respondent company being duly bound and committed to complete the project had filed an application for renewal on 11.02.2016 itself along with the renewal fees of Rs. 10,00,000/-. However, due to policy issues the license has not been renewed so far and due to this,



the application for registration with the RERA also got rejected and due to this, the bankers are also not allowing smooth finances, despite this the respondent is committed to deliver the project.

17. 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 circumstances beyond the power and control of the developer.

18. 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 authority decides seriatim the issues raised by the parties as under:

19. In 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....”

20. 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 flat 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 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.”



21. 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.”

22. 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.



23. 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 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.

24. Regarding 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.

25. With respect to the second issue raised by the complainant, the complainant has provided no proof but only assertion with respect to sub-standard quality of construction. However, the authority has issued detailed order in following para no. 26.

Findings of the authority

26. 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.

27. 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 839, 8th Floor, Tower-Lotus 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

28. 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 15 days from 05.09.2018 otherwise penal consequences will follow.



29. 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 promoter 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 promoter as per terms and conditions of the license. The promoter 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.



30. 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.

31. The order is pronounced.

32. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

HARERA
GURUGRAM

