

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

Complaint No. : 406 of 2018
First date of hearing: 07.08.2018
Date of Decision : 06.11.2018

Mr. Jasbir Singh,
R/o. H.No.-2707, Sector-3 Rohtak,
Haryana

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:

Shri Jasbir Singh Complainant in person
Shri Sushil Yadav Advocate for the complainant
Shri Sandeep Choudhary Advocate for the respondent

ORDER

1. A complaint dated 07.06.2018 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. Jasbir Singh, against the promoter M/s Apex Buildwell Pvt. Ltd., on account of violation of the clause 3(a) of the apartment buyer's agreement executed on 14.03.2013 in respect of



apartment number 875, 8th floor, block/tower ‘Tulip’ in the project ‘Our Homes’ for not handing over possession on the due date i.e. 02.06.2017 (as per the Apartment Buyer Agreement along with the grace period) which is an obligation under section 11(4)(a) of the Act ibid.

2. The particulars of the complaint case are as under: -

1.	Name and location of the project	“Our Homes”, Sector 37-C, Gurugram
2.	Apartment/unit no.	875 on 8 th floor, block/tower ‘Tulip’
3.	Apartment measuring	48 sq. mtr. of carpet area
4.	RERA registered/ Un registered.	Un registered
5.	Nature of real estate project	Group Housing Colony
6.	DTCP license	13 of 2012
7.	Booking date	12.10.2012
8.	Date of execution of apartment buyer’s agreement	14.03.2013
9.	Payment plan	Time linked payment plan
10.	Basic sale price	Rs.16,00,000/-
11.	Total amount paid by the complainant till date	Rs.11,54,708/-
12.	Percentage of consideration amount	Approx. 72 Percent
13.	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) [Consent to establish granted on 02.12.2013]	02.06.2017
14.	Delay in handing over possession till date	1 year three months and 16 days
15.	Penalty clause as per apartment	Clause 3(c)(iv) of the



	buyer's agreement dated 14.03.2013	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 has been provided by the complainant and the respondent. An apartment buyer's agreement dated 14/03/2013 is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 2nd June 2017. Neither the respondent has delivered the possession of the said unit till 18.09.2018 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 14.03.2013. Therefore, the promoter has not fulfilled his committed liability till date.
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The counsel for the respondent appeared on 07.08.2018. The case came up for hearing on 07.08.2018 , 18.09.2018 , 16.10.2018 and 06.11.2018. 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.



Facts of the complaint

5. Briefly stated, the facts of the case as culled out from the case of complainant are that on 01st August 2012 the respondent company's sales representatives had approached the complainant and pursued for the booking of the project namely 'Our Homes' situated at sector 37-C, The complainant had filled -in an application form for showing interest in the complex and was allotted the said apartment having a carpet area of 48 sq. mtrs. approx. in the said housing complex vide apartment buyer's agreement.
6. The complainant paid booking amount of Rs.1,60,000/- vide cheque dated 13.10.2012. The apartment buyer's agreement was executed on 14.03.2013 wherein the developer agreed to handover possession of the flat within 36 months plus 6 months grace period from the date of commencement of construction of the complex upon the receipt of all project related 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 low pace and there is no possibility in near future of its completion.



7. That the basic sale price was Rs.16,00,000/- and the complainant has paid Rs.11,54,708/- till date. That the complainant has approached the respondent company time and again, but the respondent company has neither responded 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 of low quality. 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.5u

8. **Issues raised by the complainants are as follow:**

- i. Whether the respondent is liable for not handing over the possession on time to the complainant?
- ii. Whether the complainant is liable to pay the interest amount of Rs.3,76,654/- at the prescribed rate?
- iii. Whether the respondent is liable to refund the amount of Rs.11,54,708/- paid with interest at the prescribed rate along with the monthly rental paid by the complainant from 2013 till date.



9. **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 refund the amount paid ie. Rs. 11,54,708/- by the complainant as the cost of the unit allotted.
 - b) Interest on total amount from 2013 till date.
- ii. The respondent to deliver the possession of the flat with penalty of Rs.14000/- per month from 2013 to till date as this amount is paid by complainant as rent.

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

Respondent's reply

10. The respondent admitted the fact that it is developing the project situated at 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 r/w rule 29 of HRERA rules,2017 of the Act



and hence the authority does not have jurisdiction to hear the matter.

11. 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.

12. 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

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.

14. The respondent further admits that they are behind schedule of completion, but the respondent is not responsible for the delay as the delay occurred due to extraneous circumstances beyond their control. Further, the respondent could get the consent to establish from HSPCB 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.
15. However the company filed an application for renewal of license 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 such issues come in their way of delivering possession.



16. 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.
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 circumstance 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.

19. **Determination of issues**

- I. Regarding the **first issue**, the promoter was under a legal obligation for handing over the possession as per the BBA. However, they committed a default in doing the same and thus, they are liable to pay delayed interest.
- II. Regarding **second issue**, the respondent shall be liable to pay delayed interest at the prescribed rate of 10.45% as has been pronounced in the subsequent paras.
- III. Regarding **third issue**, the respondent shall not be made liable to pay the refund of the whole amount as the project



is close to completion i.e more than 50% of it has been completed .

Findings of the Authority :

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 is as under:

20. 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 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....”

21. Accordingly, the due date of possession was 02.06.2017 and the possession has been delayed by one year three months and sixteen 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.”

22. 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 Haryana 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.”

23. 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 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. With respect to the third issue raised by the complainant, as the promoter has failed to fulfil his obligation under section 11, 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. 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.



25. As mentioned by the respondent in his reply the license has not been renewed till date which will in return not make him get the OC .

Decision and directions of the authority

26. 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 has apprised the authority w.r.t. his tale of woe by stating that his licence is not renewed and the project is not registered with the authority. The basic tenets of the affordable housing scheme were brought to the notice of the counsel for the complainant.
- (ii) As per clause 5 (iii) (b) of the policy, the complainant has a valid alternative to seek refund after wriggling out of the project under the prevailing circumstances. Since he has come in RERA authority, as such, as per the provisions of



section 18 (1) he is eligible for refund alongwith prescribed rate of interest, which is allowed.

27. Complaint is disposed off.

28. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 06.11.2018



HARERA
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