

PROCEEDINGS OF THE DAY

Day and Date	Monday and 29.10.2018
Complaint No.	235/2018 case titled as Mrs. Sangeeta Pankaj & another V/s M/s RMS Estate Pvt. Limited & Another
Complainant	Mrs. Sangeeta Pankaj & another
Represented through	Smt. Sangeeta Pankaj and Shri Vijayanand Choudhary complainant in person with Shri Sushil Yadav, Advocate for the complainant.
Respondent	M/s RMS Estate Pvt. Limited & another
Respondent Represented through	Shri Suresh Kumar, Advocate for the respondent.
Last date of hearing	4.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Vide order dated 30.8.2018, both the parties have agreed to settle the matter between themselves but till today no such settlement has been arrived at inter-se them. Complainant has raised the issue that they have already paid an amount of Rs.58,32,173/-out of the total sale consideration of Rs.1,24,36,335/- but the builder has failed to raise any construction. Counsel for the respondent stated that they are ready to refund the amount alongwith interest. As per provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, the buyer is entitled to seek refund of the deposited amount alongwith prescribed rate of interest @ 10.45%. The

respondent is directed to refund the entire amount paid by the complainant within a period of 90 days from the date of this order under section 18 (1) of the Act ibid read with rule 16 of the Haryana Real Estate (Regulation & Development) Rules, 2017.

Complaint stands disposed off. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

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

Complaint No. : 235 of 2018
Date of Institution : 08.05.2018
Date of Decision : 29.10.2018

1. Mrs. Sangeeta Pankaj
2. Mr. Vijayanand Choudhary **...Complainants**
R/o 5/1-D Block, IGIMS, Sheikhpura,
Patna 800014 (BIHAR)

Versus

1. M/s RMS Estate Pvt. Ltd.
2. M/S Agrante Realty Ltd.
Registered Office 522-524 Tower "A"
Jasola New Delhi 110044 **...Respondents**

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Complainants in person with
Shri Sushil Yadav
Shri Suresh Kumar

Advocate for the complainants
Advocate for the respondents

ORDER

1. A complaint dated 08.05.2018 was filed under section 31 of the Real Estate (Regulation And Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation And Development) Rules, 2017 by the complainants Mrs. Sangeeta



Pankaj and Mr. Vijayanand Choudhary, against the promoters M/s RMS Estate Pvt. Ltd. and M/s Agrante Realty Ltd., on account of violation of clause 18(a) of the builder-buyer agreement executed on 26.05.2014 for unit no. Harmony-I K/E/1403 having 2261 sq. ft. approx. in the project “Beethoven’s8”, Sector-107, Gurugram for not giving possession on the due date 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	Beethoven’s 8 Sector-107, Gurugram
2.	Registered/ unregistered	Not registered
3.	Unit no.	Harmony-I K/E/1403
4.	Total cost	Rs. 1,24,36,335/-
5.	Date of execution of agreement to sell	26.05.2014
6.	Date of allotment	26.05.2014
7.	Total amount paid by the complainant	Rs. 58,32,173/-
8.	Percentage of consideration amount	47% Approx.
9.	Date of delivery of possession.	Clause 18(a) 42 months from the date of allotment, which is not the same as date of this agreement i.e. 26.11.2017
10.	Delay of number of months/ years upto	11 Months
11.	Penalty Clause as per builder buyer agreement dated	Clause 18 (b)- Rs. 7/- per sq. ft. per month



12.	Cause of delay in delivery of possession	Due to force majeure
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3. As per the details provided above, which have been checked as per record of the case file. A builder buyer agreement is available on record for unit no. Harmony-I K/E/1403 according to which the possession of the aforesaid unit was to be delivered by 26.11.2017. The promoters have failed to deliver the possession of the said unit to the complainants by the due date as per builder buyer agreement dated 26.05.2014. Therefore, the promoters have not fulfilled their committed liability as on date.
4. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. Accordingly, the respondents appeared on 11.07.2018. The case came up for hearing on 05.06.2018, 11.07.2018, 02.08.2018, 30.08.2018, 04.10.2018 and 29.10.2018. The reply has been filed on behalf of the respondent no. 2 on 01.08.2018.



- Facts of complaint**
5. In the present case the developer is M/s RMS Estate Pvt. Ltd. and respondent no.1 authorized respondent no. 2 to promote market and sale the project/unit/apartment in the said complex. That the respondent no.1 provided the petitioner with

- an application form containing all the unilateral terms and conditions for provisional registration for a flat in the aforesaid project of the respondents which was duly executed and was accepted by the applicant along with booking amount Rs. 518550/- in their office vide receipt No. R/B/191 dated 14.02.2014.
9. The complainants submitted that flat buyers agreement was executed between the petitioner and respondent no.1 on 26.05.2014 and the respondent allotted a unit/flat bearing no. 1403 in building Harmony having super built-up area of 2261 sq. ft. for total sale consideration of Rs.12436335/-dated 26.05.2014.
10. The complainants have deposited Rs. 58,32,173/- to the respondents. Further, the complainants regularly visited the office of respondents but were surprised to know after depositing the said amount, construction has not been started. Despite receiving of 50% payment of total sale consideration and paying all the demands raised by the firm for the said flat, the respondents have failed to deliver the possession of the allotted flat to the complainants within 42 months i.e. 26.11.2017.



11. The complainants submitted that they have taken a loan of Rs. 80 lakh from SBI bank @ Rs.10.1% for which they are remitting an amount of Rs. 30,000/- per month and after investing properly from SBI the bank sanctioned the loan but now when the complainants went to SBI to inform about the fraud by the builders they said we have given loan to complainants and not to the builders but in the agreement with the bank it is clearly mentioned that if the builders are not able to deliver or in the event of failure of the builder to complete the project the builder/ owners shall pay the entire money received by them from the borrower to the SBI.

12. **Issues raised by the complainants**

- i. The respondents have incorporated a one side clause buyer agreement which tilted in favour of promoter, which is unjustified.
- ii. That flat has not been handed over to the petitioner till today and there is no reasonable justification for the delay.

Relief sought

- i. Direct the respondents to refund the amount paid by the complainants along with interest on the amount paid and the interest incurred from the bank loan as the construction of the project is not in progress.



- ii. Direct the respondents to pay interest calculated @ 18% per annum on compound rate from the committed date of possession i.e. 14.08.2017 on the entire sum paid by the complainants to the respondents.

Reply on behalf of respondent no.2

Preliminarily objections:

14. The complainants are not entitled for the refund as there is no cancellation of the agreement by either of the parties and the same is subsisting.

15. The RERA is not applicable on the project in question as the provisions of the said Act becomes applicable to the projects immediately after the registration of the projects under RERA and the applicability of the provision of the Act are prospective in nature and consequences, thereof, arising out of the breach of any obligation under RERA are also prospective in nature, therefore, the respondent cannot be penalised for the obligation which arise immediately after registration under the act.

16. The respondent submitted that the development license no.23 of 2012 granted to the respondent has expired in March, 2016 and renewal process is still pending before concerned authority i.e. DTCP and process for the registration of the project stands registered. The authority does not have jurisdiction to entertain



the complaint, therefore the complaint of the complainant deserves to be dismissed in limine.

Reply on Merits and additional submission

17. The respondent submitted that respondents were granted license no. 23 of 2012 under the provisions of Haryana Development and regulation of Urban Areas, Act on 27th March, 2012 for the development of group housing colony on the land total admeasuring 18.0625 acres which is situated in village Dharampur, Gurgaon, Haryana in terms of the license. That immediately after the grant of license in favour of the respondent a registered development agreement bearing registration no. 5295 registered on 28th May, 2012 was executed by the respondent in favour of M/s Sarvaram Infrastructure India Pvt. Ltd. out of the total licensed area, the respondent has assigned all the development rights along with marketing and selling rights on 10.218 acres to the said company i.e. M/s Sarvaram Infrastructure India Pvt. Ltd. for the total consideration of Rs. 37,29,00,000/-.



18. That on the basis of the memo dated 09.05.2015 issued by the DTCP, Haryana a dispute arose between the respondent and the M/s Sarvaram Infrastructure India Pvt. Ltd. which is still pending for final adjudication. However, during the pendency of

the said arbitration proceeding, validity of the license ended, and as the said company was mandatorily required to pay proportionate share for renewal of the license among those of other relevant fees, however, the said company failed to pay its proportionate share of fee despite the specific direction to that effect by the arbitrator vide order dated 05.05.2016.

18. The respondent agreed that the complainants have booked a flat in our project. Further the respondent submitted that by retrospectively applying RERA to the law on the contractual obligations between the parties entered into before coming in force of the Act would be highly unwarranted, illegal and arbitrary in nature.

19. The respondent admitted that complainants were allotted the flat vide allotment letter dated 21.05.2014 and subsequently builder buyer agreement was executed and it is submitted that what was promised was the completion of the project and impliedly the possession of the flat was to be given after completion of the project. To which the complainants have admittedly given its agreement and the completion of the project was always subject to the force majeure clause and for more clarification, the project could have not been completed because of the unprecedented real estate market crash, low sales poor recovery from the existing customer of the money



and apart from all this, the company is under constraint because of the escalated of the EDC charges payable to the Director Town and Country Planning and the inability of the M/s Sarvaram Infrastructure India Private Limited to pay the proportionate share of the EDC, who actually is the marketing, development and selling right holder of more than 10 acres of the licensed land in terms of the development agreement dated 23.05.2012. The company has made to discharge all this liability and fasten the progress of the construction and efforts are being made to complete the project and handover the possession to the customer by April, 2020.

20. The respondent denied that complainants ever visited the site of the company and further denied that construction work has not been started rather the construction work of the project is on its full swing and the respondent is set to complete the project by April, 2020.
21. The respondent agreed that clause 18(b) of the agreement provides for the compensation @ Rs. 7/- per sq. ft. in case of delay in completion of the construction of the apartment and receiving completion certificate however, the same is subject to the exception i.e. of force majeure.



22. The respondent submitted that respondent has not agreed to pay or refund the money taken by the complainant as loan from SBI and bank itself who can answer for the said allegation.

23. **Determination of issues:**

- i. Regarding **first and second issue** raised by the complainants, as per clause 18(a) of the builder-buyer agreement, the company proposed to hand over the possession of the said unit by 26.11.2017. The clause regarding possession of the said unit is reproduced below:

“ 18(a) POSSESSION OF FLOOR

The company shall endeavour to complete the construction of the said apartment within 42 months from the date of allotment ,which is not the same as date of this agreement....”

Accordingly, the due date of possession was 26.11.2017. As far as the penalty clause in case of delay in possession is concerned which is Rs. 7/-sq. ft. of the super area per month. Therefore, there is delay of 11 months in handing over the possession. it is held to be one sided as also held in para 181 of the judgment in **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.”

Findings of authority

24. 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 complainants at a later stage.
25. As the possession of the flat was to be delivered by 26.11.2017 as per the clause referred above, the authority is of the view that the promoter has violated 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.”

26. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. Section 34(f) is reproduced below:

“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.”

It has been 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.

27. As per obligations on the promoter under section 18(1) proviso, in case the allottee wishes to withdraw from the project, the



promoter is obligated to refund the amount paid by the complainants along with interest at the prescribed rate as the promoter has not fulfilled his obligation. 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 complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.



28. The authority has decided to take suo-motu cognizance against the said promoter for not getting the project registered and for

that separate proceeding will be initiated against the respondents u/s 59 of the Act.

29. Keeping in the view of the authority vide order dated 30.8.2018, both the parties have agreed to settle the matter between themselves but till today no such settlement has been arrived at inter-se them. Complainants have raised the issue that they have already paid an amount of Rs. 58,32,173/- out of the total sale consideration of Rs.1,24,36,335/- but the builder has failed to raise any construction. Counsel for the respondent stated that they are ready to refund the amount along with interest. As per provisions of section 18 (1) of the Real Estate (Regulation And Development) Act, 2016, the buyer is entitled to seek refund of the deposited amount alongwith prescribed rate of interest @ 10.45%.

30. Thus, the authority, exercising powers vested in it under section 37 of the Haryana Real Estate (Regulation And Development) Act, 2016 hereby issue direction to the respondents to refund the entire amount Rs. 58,32,173/- paid by the complainants alongwith prescribed rate of interest @ 10.45% within a period of 90 days from the date of this order under section 18 (1) of



the Act read with rule 16 of the Haryana Real Estate
(Regulation And Development) Rules, 2017.

31. The order is pronounced.
32. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.10.2018

HARERA
GURUGRAM

