

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

Complaint No. : 234 of 2018
Date of first hearing: 05.06.2018
Date of Decision : 13.11.2018

Jitender Kumar
Apartment plot no. 12A Dwarka sector 7
New Delhi- 110075

Complainant

Versus

M/S DLF Ltd.
Shopping Mall, 3 Floor, Arjun Marg, DLF City
phase 1, Gurugram

Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Sandeep Kumar Authorised representative on
behalf of the complainant
Shri Mohd Faris Advocate for the complainant
Shri Ishaan Dang Advocate for the respondent



ORDER

1. A complaint dated 07.05.2018 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 complainant Mr. Jitender Kumar, against the promoter M/s DLF Ltd, on account of violation of the clause 19(a) of the apartment buyer's agreement executed on 05.09.2016 in respect of apartment number UTK151, 15 floor tower K having super area 2763sq ft. in the project 'The Ultima' for not handing over 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	"The ULTIMA", Sector-81, DLF Gardencity District Gurugram
2.	RERA registered/not registered	Not Registered
3.	Flat/unit no.	UTK151, 15 Floor Tower K
4.	Flat measuring	2763sq. ft.
5.	Booking date	05.09.2016
6.	Application for allotment of sale	05.09.2016
7.	Payment plan	Construction linked payment plan
8.	Total consideration amount as per statement of account dated 24.05.2018.	Rs.2,75,90,000/-
9.	Total amount paid by the Complainant till date	Rs.2,8,60,000/-
10.	Percentage of consideration amount	more than 100 percent
11.	Date of delivery of possession as per clause 19(a) of the fresh application for allotment by sale (60 months or fulfilment of the	26.09.2021



	preconditions imposed thereunder)	
12.	Delay in handing over the possession till date	Premature complaint
13.	Penalty clause as	Clause 19(a) of the agreement.
14.	Date of receipt of OC	17.07.2017

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. A allotment of sale is available on record for the aforesaid unit according to which the possession of the said apartment is to be delivered by 27.09.2021. The respondent company has not delivered the possession till date.
4. Taking cognizance of the complaint, the authority issued notice dated 16.05.2018 to the respondent for filing reply and for appearance. The respondent through his counsel appeared on 05.06.2018. The case came up for hearing on 11.07.2018, 23.08.2018, and 27.09.2018. The reply has been filed on behalf of the respondent on 27.09.2018



Facts of the case.

5. Briefly stated, the facts of the case as culled out from the case of complainant are that the complainant booked a flat no. UTK151, 15 floor tower K measuring 2763 sq. ft. In project ULTIMA, Sector 81, DLF Gardencity Gurugram directly from the promoter M/s DLF Ltd. and the total basic price of flat as per buyer agreement is Rs.2, 75,90,000/-
6. The complainant submitted that the opposite party is a private limited company, having its registered office at DLF Shopping Mall, 3rd floor Arjun Marg, DLF City Phase 1, Gurugram -122002, Haryana, India, engaged in real business of real estate. The company further submits that the opposite party gave wide publication in the print and electronic media for its housing project known as “The Skycourt” promising a rosy picture of the project with multiple, modern and contemporary 2 and 3 bedroom dwelling units spread across various tastefully designed residential blocks with all essential amenities.
7. Further complainant submitted that the complainant based on various advertisements in year 2013, booked a unit in the



project "The Skycourt", Sector -86, Gurugram by making a payment of Rs. 10,38,000/- as booking amount.

8. The complainant also submitted that after collecting substantial amount of the total consideration of the unit from the complainant executed the apartment buyer agreement only in December,2013. That even though the agreement contained various one-sided and arbitrary clause, yet the complainant could not negotiate on any terms, since the opposite party had already collected significant amount of money. That the complainant was allotted unit no.SCC081 on 8 floor in block C admeasuring 1852 sq.ft. The buyer agreement was executed on 10.12.2013.

9. The complainant submitted that in order to make timely payments had availed loan services from ICICI Bank subvention scheme, wherein a tripartite agreement was also executed. The complainant had paid an amount of Rs.1,52,79,000/- to the opposite party.

10. Complainant submitted that due to the inability of the opposite party to deliver the unit allotted to the complainant, opposite party persuaded the complainant to have faith in



them and accordingly the complainant with promises of timely delivery of possession of unit was induced to shift his unit to different project of theirs. The complainant had no other option but to give in, hence, he agreed to shift from “The Skycourt” to “Ultima”, another project of the opposite party situated in Sector 81, Gardencity, Gurugram. He was allotted unit no. UTK151 in “Ultima”. The complainant further made payment against the demands raised by the opposite party and vacant promises of delivering the project on time. The opposite party even after collecting Rs.2,86,00,000/-from complainant till date. The total sale consideration of the property in “Ultima” was Rs. 2,75,00,000/-, but opposite party has till date collected Rs. 2,86,00,000/- from complainant.

11. Issues raised by the complainant are as follow:

- i. Whether the delivery of possession of the apartment to the complainant is delayed?.
- ii. Whether there has been deliberate or otherwise, misrepresentation on the part of the developer where



in the clause of the agreement entered into are defied by the developers?.

- iii. Whether the promoter has violated the mandates of the Act under governance and as well failed to discharge the rules or regulation made thereunder the terms and conditions of the agreement?.

Relief sought

12. The relief sought by the complainant are as follow:
13. The complainant is claiming to direct the respondent to refund the amount paid, Rs.2,86,00,000/- along with interest rate 24% p.a in view of fact that the complainant does not want any kind of association with respondent herein;
14. The complainant is seeking to direct the respondent to pay a sum of Rs.10,00,000/- for unfair trade practices;
15. The complainant is seeking to direct the respondent to pay a sum of Rs.10,00,000/- for mental agony and harassment;
16. The respondent be directed to pay a sum Rs.1,00,000/- as reimbursement of legal expenses;



17. The promoter be directed to pay a sum of Rs.10,00,000/- as interim compensation.

Reply by the respondent

18. The respondent has raised various preliminary objections and submissions challenging the jurisdiction of this hon'ble authority. They are as follow:

19. The respondent submits that the present complainant is not maintainable before this hon'ble authority and the same is liable to be dismissed for want of maintainability as well as jurisdiction. The provisions of the Real Estate (Regulation And Development) Act 2016 and the Haryana Real Estate (Regulation And Development) Rules 2017 are applicable on the new real estate projects for which the licenses have been granted on or after 01.05.2017 or which are falling within the definition of "**Ongoing Project**" as on 31.07.2017 i.e. the period of three months from the commencement of Act 2016. "**Ongoing Project**" has been defined under Rule 2 (o) as under:

(o) "*on going project*" means a project for which a license was issued for the development under the Haryana



Development and Regulation of Urban Area Act, 1975 on or before the 1st May,2017 and where development works were yet to be completed on the said date, but does not include:

- (i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development And Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the competent authority on or before publication of these rules; and
- (ii) that part of any project for which part completion / completion, occupation certificate or part thereof has been granted on or before publication of these rules.

20. It is submitted that license bearing no. 61 of 2011 dated 30.06.2011 and no. 114 of 2012 dated 15.11.2012 had been granted by Directorate of Town and Country Planning, Haryana, Chandigarh for setting up of a Group Housing Colony measuring 22.231 acres in Sector 81, Gurugram on which the Group Housing Residential Project "Ultima" was planned to be developed. Building Plans for Towers A to H, J



to N, Q to S and others have been approved vide BR III Memo No. ZP-849/AD(RA)/2013/1317 dated 16.01.2014.

Towers E H, J, K, L, N, R and S had been launched for sale by the respondent. The Occupation Certificate in respect of towers bearing numbers E, H, J, K, L and S was applied by the respondent prior to 31.07.2017. The same is pending consideration with the competent authority.

21. So far as tower "K" where the applicant / complainant had booked his apartment and pertaining to which the instant complaint has been preferred by the complainant is concerned, the same is not an "**Ongoing Project**" and thus not amenable to the provisions of Real Estate (Regulation and Development) Act 2016 and the Haryana Rules 2017. Thus the present complaint preferred by the Complainant pertaining to his apartment in tower "K" is not maintainable.

22. That the complainant in his complaint has also referred to the earlier booking of apartment made by the complainant in the real estate project "Skycourt" promoted and developed by the respondent. The said booking had been made by the complainant on 27th of August 2013. Apartment bearing



number SCC 081 measuring 1852 square feet (super area) had been allocated to the complainant by the respondent. It is pertinent to mention that two car parking slots bearing numbers PC 1027 and PC 1028 were also allocated to the complainant. The allocation of the aforesaid apartment had been confirmed to the complainant by the respondent vide letter dated 31st of August 2013.

23. The complaint submitted that apartment buyers agreement dated 14th of May 2014 was voluntarily and consciously executed by the complainant. It is pertinent to mention that the draft of the aforesaid contract had been uploaded on the website of the respondent at the time of launch of the aforesaid project. Moreover, copy of the said form was available in the head office of the respondent. In fact, the complainant has proceeded to execute the aforesaid contract after fully understanding the terms and conditions incorporated therein and implications thereof. That clause 58 of the apartment buyers agreement dated 14th of May 2014 clearly provided that all disputes arising between the parties to the aforesaid contract would be resolved through



arbitration to be conducted in accordance with provisions of The Arbitration and Conciliation Act, 1996. On this account also the present complaint is absolutely misconceived and is factually and legally unsustainable.

24. That it is pertinent to mention that for the apartment referred to above, the construction thereof had to be completed by the respondent and occupation certificate had to be obtained within the period of 4 years from the date of booking. It needs to be mentioned that the occupation certificate for Sky Court project was obtained by the respondent on 17th of July 2017 . Thus, the respondent had proceeded to undertake the construction of the aforesaid project in a timely manner.

25. The respondent submitted that the construction of Sky Court Project was going on in a timely and streamlined manner. The complainant had verbally requested the respondent to shift/upgrade the complainant to an apartment in the more upmarket The Ultima Project. The respondent had sent email dated 26th of September 2016 seeking confirmation with regard to shifting/upgradation to The Ultima Project.



26. The complainant submitted that that the complainant had coordinated with ICICI Bank and eventually the no objection certificate for the shifting/upgradation of apartment of the complainant to The Ultima Project was provided by the aforesaid bank on 28th of September 2016 (**Annexure R6**). Allotment letter dated 30th of September 2016 (**Annexure R7**) had been issued by the respondent to the complainant in respect of apartment bearing number UTK 151 and parking slots bearing numbers PK 2036/PK 2037/PK 2038 in The Ultima Project. By virtue of the same letter it was conveyed to the complainant by the respondent that the booking made by the complainant for Sky Court Project stood cancelled. All amounts received by the respondent in respect of the apartment initially booked by the complainant in Sky Court Project were also transferred against the aforesaid newly allotted unit. That fresh application form (**Annexure R8**) for allotment by sale had been submitted by the complainant for obtaining allotment of apartment in The Ultima Project. It was specifically mentioned in clause 19 of the application form that the respondent would endeavour to complete the



construction of the said apartment within the period of 60 months from the date of application and to offer possession of the same after obtaining occupation certificate from the competent authority.

27. That it is obvious that the period of 60 months from the date of booking (27.09.2016) shall expire on 27.09. 2021. Thus, up to the aforesaid date, the respondent can proceed to undertake the completion of the apartment booked by the complainant. It is apparent that the present complaint is completely premature.

28. The complainant submitted that the complainant has cleverly concealed and mis-represented the relevant facts before this hon'ble authority. The complainant has not disclosed in his complaint that he was desirous of upgrading to a bigger apartment and in this regard, he made a request for upgradation, and duly forwarded and confirmed it on email dated 26.09.2016 which was accepted by the respondent on 26.09.2016 itself. It is evident from record that the complainant was completely satisfied with the performance of the respondent.



29. The complainant submitted that it is precisely for this reason that the complainant had himself voluntarily opted to shift to “Ultima Project”. The complainant had chosen a 4 BHK apartment in The Ultima Project as against a 3BHK apartment in the “Skycourt-Project”. The complainant has intentionally withheld all communications in this regard and thus, on this ground alone, the complaint is liable to be dismissed.

30. The respondent submitted that at the time of upgradation, complainant had himself consciously filed in and submitted an application form seeking allotment of an apartment in the “Ultima Project”. The complainant had paid booking amount of Rs. 12,50,000.00 vide cheque number 000003 dated 05.09.2016. The terms and conditions incorporated in the application form referred to above were voluntarily and consciously accepted by the complainant are binding upon both the parties with full force and effect.

31. The respondent submitted that the complainant cannot legally place reliance on the covenants incorporated in apartment buyers agreement dated 14.05.2014 executed between the complainant and the respondent in respect of



apartment in Skycourt-Project. The reliance made by the complainant on the terms and conditions contained in the aforesaid apartment buyers agreement is absolutely misconceived and is factually and legally unsustainable. The covenants contained in the aforesaid contract shall not determine the rights and obligations of the parties. A fresh allotment in respect of apartment referred to above located in The Ultima Project had been made by the respondent in favour of the complainant, which is regulated by terms and conditions contained in the application form referred to above submitted by the complainant with the respondent in respect of the said apartment.

32. The respondent submitted that there is no default of any nature can be attributed to the respondent and pre-requisites for invocation of provisions of Section 18 of the Real Estate (Regulation And Development) Act, 2016 are conspicuously absent. The institution and prosecution of present proceedings is complete misuse of process of law. The complainant has no locus standi or cause of action to file the



present complaint. The complaint filed by the complainant deserves to be dismissed.

Determination of issues:

33. After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

34. With respect to the **first and third issue** raised by the complainant, as per clause 19(a) of fresh application for sale, the possession of the unit was to be handed over within 60 months from the start of construction. Therefore, the due date of handing over the possession shall be 27.09.2021. The clause regarding the possession of the said unit is reproduced below:

“19(a) Possession

Subject to terms of this clause and subject to Allottee(s) having complied with all the terms and conditions of this agreement, and not being default under any of the provisions of this agreement and compliance with all provisions, formalities, documentation, etc., as prescribed by the company, the company proposes to handover the possession of the Independent Floor within 60 months from the start of construction. The allottee(s) agrees and



understands, for applying the occupation certificate in respect of the Independent Floor and/or the project.”

35. Accordingly, the due date of possession is 27.09.2021. although the due date of possession has so far not been crossed, the interest for the delayed possession as per section 18(1) of the Act has not accrued. However, it may be noted that the delay compensation payable by the respondent @ Rs.20/- per sq. ft. per month of the super area till the date of notice of possession as per clause 19(a) of 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.”

36. The complaint is premature as the due date of handing over the possession is 27.09.2021 which has so far not been crossed.

37. With respect to the **second issue** raised by complainant, as per section 101 of Indian evidence act burden of proof is on the person who raised the issue and complainant have not adduced any evidence but has made only assertion and the same has been denied by the respondent. Thus, the said issue becomes superfluous.

Findings of the authority

38. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. 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.

39. Timely delivery of possession as per builder buyer agreement in Skycourt project is 14.5.2014 and the fresh agreement with regard to shifting the unit of the complainant from 'Skycourt project' to 'Ultima Project' was not signed inter se both the parties for a flat No.UTK-151 tower-K shifted by the complainant of his own volition in October 2017.

40. By submitting an application with the respondent. It has been stated by the complainant that on account of some understanding, fresh BBA for the new unit in 'Ultima Project' could not be signed. However, the aforesaid application of the complainant is a complete semblance for giving consent in new project by the name of Ultima Project for flat No.UTK-151 tower-K. As per the committed date of delivery of possession, respondent is to deliver the unit on 26.9.2021. However, it has been stated at bar by counsel for the respondent that the project is ready in the month of October 2018 and letter dated 11.6.2018 for handing over possession



was sent to the complainant. Complainant has already made a payment of **Rs.2,75,90,000/-** i.e. 95% of the total sale consideration. Complainant on account of brain hemorrhage of his spouse is seeking refund in a persistent manner since December 2016 (RERA Act was not enforced).

Decision and directions of the authority

41. 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:

Powers of Authority to issue directions

42. 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.
43. To meet the ends of justice the authority under Section 38(2) shall be guided by the principles of natural justice.



44. Since the respondent is ready to deliver the possession within 7 days as the project is complete in all respects and a copy of occupation certificate has already been placed on record, as such, keeping in view the ends of justice, it is ordered that the complainant may take over the possession of flat/unit.

45. So far as his prayer for refund is concerned, that is not tenable at the moment. Complainant is at liberty to approach the appellate tribunal, if not satisfied with this order.

46. Complaint is disposed of accordingly.

47. The order is pronounced.

48. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

(Dr. K.K. Khandelwal)

Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 13.11.2018



PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 13.11.2018
Complaint No.	234/2018 Case titled as Mr. Jitender Kumar Vs M/s DLF Limited
Complainant	Mr. Jitender Kumar
Represented through	Complainant in person with Shri Piyush Singh Advocate.
Respondent	M/s DLF Limited
Respondent Represented through	S/Shri J.K.Dang and Ishaan Dang Advocates for the respondent.
Last date of hearing	22.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Written submissions filed by the counsels for both the parties today.

Arguments heard.

Major bone of contention inter se both the parties is w.r.t. timely delivery of possession as per Builder Buyer Agreement in Skycourt project is 14.5.2014 and the fresh agreement with regard to shifting the unit of the complainant from 'Skycourt project' to 'Ultima Project' was not signed inter se both the parties for a flat No.UTK-151 Tower-K shifted by the complainant of his own volition in October 2017 by submitting an application with the respondent. It has been stated by the complainant that on account of some understanding, fresh BBA for the new unit in 'Ultima Project' could not be

signed. However, the aforesaid application of the complainant is a complete semblance for giving consent in new project by the name of Ultima Project for flat No.UTK-151 Tower-K. As per the committed date of delivery of possession, respondent is to deliver the unit on 26.9.2021. However, it has been stated at bar by counsel for the respondent that the project is ready in the month of October 2018 and letter dated 11.6.2018 for handing over possession was sent to the complainant. Complainant has already made a payment of **Rs.2,75,90,000/-** i.e. 95% of the total sale consideration. Complainant on account of brain hemorrhage of his spouse is seeking refund in a persistent manner since December 2016 (RERA Act was not enforced).

Since the respondent is ready to deliver the possession within 7 days as the project is complete in all respects and a copy of occupation certificate has already been placed on record, as such, keeping in view the ends of justice, it is ordered that the complainant may take over the possession of flat/unit.

So far as his prayer for refund is concerned, that is not tenable at the moment. Complainant is at liberty to approach the appellate tribunal, if not satisfied with this order.

Complaint is disposed of accordingly. Detailed order will follow.
File be consigned to the registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
13.11.2018