

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 31.10.2018
Complaint No.	33/2018 Case titled as Mr. Vivek Lamba V/s M/s S.S. Group
Complainant	Mr. Vivek Lamba
Represented through	Complainant in person
Respondent	M/s S.S. Group
Respondent Represented through	Ms. Richa Tuteja, authorized representative on behalf of the respondent-company with Shri Ashish Chopra, Advocate for the respondent.
Last date of hearing	4.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

It has been alleged that as per clause 8.1 of the Builder Buyer Agreement dated 16.10.2013 signed inter se both the parties i.e. builder and complainant in respect of unit No.4D, Tower No.T-2, 4th floor, possession of which was to be handed over within 36 months + 3 months grace period which comes out to be 16.1.2017. However, the builder has failed in delivering possession of the unit. In this respect, vide previous order dated 22.5.2018, local commissioner was appointed. He has submitted his report on 9.7.2018. As per report of the local commissioner, the status of the project is

that 45% work has been completed. Builder has applied for registration. However, the project stands un-registered at the moment. The licence of the project is pending for renewal with the competent authority. As such, builder does not possess a valid licence as on date. The respondent has applied for renewal of licence of the said project. As per provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, complainant is entitled for interest on the amount which he has deposited with the builder at the prescribed rate of interest i.e. 10.45% per annum. Since no possession has been delivered, as such, builder shall give cumulative interest till date. This amount shall be paid from due date of possession i.e. 16.1.2017. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of issuance of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

As per the commitment made by the builder in his application for registration of the project, the due date of handing over the possession is 31.12.2019. If the builder in all probabilities fails to deliver possession on committed date, in that case, complainant shall be entitled to seek refund.

Complaint is disposed of accordingly. 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. : 33 of 2018
Date of Institution : 6.3.2018
Date of Decision : 31.10.2018

Mr. Vivek Lamba
R/o 635, Tower 3, HEWO Apartment, Part II,
Plot No. 41, Sector 56, Gurugram, Haryana

...Complainant

Versus

M/s S.S. Group Pvt. Ltd & Ors
Regd Office: 4th Floor, The Plaza, M.G. Road,
Gurgaon, Haryana

...Respondent

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Himanshu Raj Advocate for the complainant
Shri Aashish Chopra Advocate for the respondent

ORDER

1. A complaint dated 6.3.2018 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. Vivek Lamba against the promoter M/s S.S. Group Pvt. limited on



account of violation of 8.1 of the Flat Buyer's agreement executed on 16.10.2013 for Flat no. 4D Tower T-2, 4th Floor with a super area of 1645 sq ft in the project "The Leaf", a Group Housing Society 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	"The Leaf" Sector 85, Gurugram
2.	Unit No.	4D, Tower T-2, 4 th Floor
3.	Project area	11.093 Acres
4.	Registered/ Not Registered	Not registered
5.	DTCP license	81 of 2011
6.	Date of booking	21.6.2012
7.	Date of builder buyer agreement	16.10.2013
8.	Total consideration	Rs. 91,10,925/-
9.	Total amount paid by the complainant	Rs. 68,32,617/-
10.	Payment plan	Construction Linked Plan
11.	Date of delivery of possession.	Clause 8.1: 36 months from the date of signing of the agreement + 90 days of grace period which will be 16.1.2017
12.	Delay of number of months/ years up to 12.9.2018	1 year 8 months
13.	Penalty clause as per builder buyer agreement dated 16.10.2013	Clause 8.3 i.e. Rs 5/Sq ft. / month of the Super area



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 flat No. 4D, Tower T-2, 4th Floor, Sector 85, Gurugram in the project “The Leaf” for which the promoter has failed to deliver the possession of the said unit to the complainant. 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 for appearance. Accordingly, the respondent appeared on 10.4.2018. The case came up for hearing on 10.4.2018, 25.2018, 22.5.2018, 17.7.2018 and 30.8.2018. The reply has been filed on behalf of the respondent.

FACTS OF THE CASE

5. In June, 2012 the respondent represented to the complainants that their project is a time bound project and their plans have been sanctioned and approved by the concerned authority. They also represented that the building and the floor plan of the Group Housing Society has been prepared as per guidelines issued by DTCP/HUDA and they had all other documentary permissions with them.



6. On being allured by the words of the respondents the complainant applied for the flat and paid a sum of Rs 7,50,000/- as the booking amount on 21.6.2012 against the sale price of Rs 91,10,925/-. The allotment letter was issued on 10.9.2011 for the said flat thereby acknowledging the payment of Rs 7, 50,000/-. On 15.7.2013 a demand was raised by the respondent of Rs 8,92,856/- for commencement of the construction work at site.
7. On 16.10.2013, flat buyer agreement was entered into between the parties wherein as per clause 8.3, the construction should have been completed within 36 months + 90 days grace period from the date of execution of agreement. One of the clauses in the agreement stated that in the event of the flat buyer failing to sign and return the agreement in its original form to the developer within 30 days, all the money would be forfeited. The complainant left with no option than to sign the agreement after a gap of 16 months from the first payment made by him. However, till date the possession of the said unit has not been handed over to the complainant despite making all requisite payments as per the demands raised by the respondent.



8. The complainant stated that the respondent obtained approval from DTCP on 8.8.2013 and even before obtaining approval the respondent collected a sum of Rs 8,92,856/- on 15.7.2013 under the head "Commencement of construction work" but construction was not started. Thereafter, after several visits to the office of the respondent there was no response and the complainant then and there gave a letter of resentment for non-delivery of the possession of the flat on time.
9. The complainant states that he has paid a total sum of Rs. 68,32,617 from the period commencing from 21.6.2012 to 5.2.2018 but no possession has been offered till date.
10. The complainant submitted that despite repeated calls, meetings and emails sent 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. Complainant further submitted that given the inconsistent and lack of commitment to complete the project on time, the complainant decided to terminate the agreement.
11. As per clause 8.3 of the Flat-buyer agreement, the company proposed to hand over the possession of the said unit by



16.01.2017. The clause regarding possession of the said unit is reproduced below:

“8 Possession: The developer proposes to handover the possession of the flat within a period of 36 months from the date of signing of this agreement. The flat buyer agrees and understands that the developer shall be entitled to a grace period of 90 days, after the expiry of 36 months.....”

12. ISSUES RAISED BY THE COMPLAINANT

- I. Whether the respondent had obtained necessary permissions for constructing the said Group Housing Society before floating of the brochure/advertisements?
- II. Whether the respondents are at fault for not delivering the possession of the flat on time and for non-compliance of the buyers' agreement?
- III. Whether the respondents are liable to refund the entire amount paid by the complainant i.e. Rs. 68,32,617/- with interest at the prescribed rate of interest?



13. RELIEF SOUGHT

- I. To fully refund the amount paid by the complainant amounting to Rs 68, 32,617 with the prescribed rate of interest.
- II. To provide any other relief as the Authority deems fit and proper.

RESPONDENT'S REPLY

14. The respondent stated that the present complaint is not maintainable in law or facts. Keeping in view the fact that the project is not even registered till date with the authority, even though respondent No 1 has applied for it. But till such time until the project is registered no complaint can lie before the authority and the claim of the complainant cannot be adjudicated upon.
15. The respondent submitted that the present complaint has been filed seeking possession, interest and compensation for alleged delay in delivering possession and refund of the apartment booked by the complainant. Thus it was further submitted that complaints pertaining to possession, compensation and refund are to be decided by the adjudicating officer under section 71 of the said Act read with rule 29 of HARERA Rules 2017 and not by this authority.



16. The respondent submits that no agreement for sale as mentioned in RERA Act, 2016 has been executed between the respondent and the complainant. Rather the agreement that has been referred to is the flat buyers agreement which has been executed much prior to the coming into force of 2016 Act.
17. Respondent further submits that the complainant cannot invoke the jurisdiction of the adjudicating officer especially when there is an arbitration clause provided in the Flat Buyers Agreement, whereby all the disputes arising out of or touching upon in relation to the terms of the said agreement or its termination and respective rights and obligations is to be settled amicably.
18. The respondent further submits that, there has been no fault on the part of the respondent due to non-submission of license, as the respondent applied for renewal of the said license through letter dated 12.8.2014 before the competent authority i.e. DTCP, but no renewal thereof had been granted.
19. The respondent lastly submits that the complainant himself has not fulfilled his obligations of making timely deposit of the amount liable to be paid by him in terms of the agreement, on basis whereof he is claiming adjudication



before the authority though it is reiterated at the risk of repetition that he cannot seek adjudication since he is the one who is at fault for non-fulfilment of his obligations under RERA Act, 2016.

DETERMINATION OF ISSUES

20. With respect to the **first issue** relating to necessary permissions required for construction, the respondent was asked to register the project at the earliest. The builder has applied for registration however the project stands un-registered at the moment. The licence of the project is pending for renewal with the competent authority. As such, builder does not possess a valid licence as on date.
3. With respect to the **second and third issue**, the authority came across that as per clause 8.1 of buyer's agreement. The clause regarding the possession of the said unit is reproduced below:

"13.3 Possession and holding charges

The company has to hand over possession of the said apartment to the allottee within a period of 36 months from the date of approval of building plans and/or fulfilment of the preconditions imposed therein.

Accordingly, the due date of possession was 16.1.2017 and the possession has been delayed by 1 year 8 months till



12.9.2018. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the super area of the unit for the period of delay as per clause 8.3 of 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."

As per section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, complainant is entitled for interest on the amount which he has deposited with the builder at the prescribed rate of interest i.e. 10.45% per annum. Since no possession has been delivered as such, the builder shall give cumulative interest till date. This amount shall be paid from due date of possession i.e. 16.1.2017.



FINDINGS OF THE AUTHORITY

21. 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. For the issue of arbitration clause raised by the respondent, the amendment of Sec. 8 of the arbitration and conciliation act does not have the effect of nullifying the ratio of catena of judgments of the hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the consumer protection act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.
22. As the possession of the apartment was to be delivered by 16.1.2017, the authority is of the view that the promoter has



provided not provided possession and has failed to fulfil his obligation under section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016.

23. In the present complaint, the complainant is seeking refund of the entire money paid till date i.e. 68,32,617/- along with prescribed interest from the date of payments till actual realisation.

24. However, keeping in view keeping in view the present status of the project and intervening circumstances and in the interest of natural justice, the authority is of the considered view that in case refund is allowed in the present complaint at this stage of the project, it will adversely affect the rights of other allottees to continue the project. However, the complainant will be entitled to a prescribed rate of interest till the date of handing over of possession.

25. 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.

26. Local commissioner was appointed vide order dated 22.5.2018 and he has submitted his report on 9.7.2018. As per report of the local commissioner, the status of the project



is that 45% work has been completed. During the last proceedings dated 30.8.2018, it was brought to the notice of the authority that the project is registerable and has not been registered so far. The respondent was asked to register the project at the earliest. Builder has applied for registration. However, the project stands un-registered at the moment. The licence of the project is pending for renewal with the competent authority. As such, builder does not possess a valid licence as on date. The respondent has applied for renewal of licence of the said project.

DECISION AND DIRECTIONS OF THE AUTHORITY

27. 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) As per provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, complainant is entitled for interest on the amount which he has deposited with the builder at the prescribed rate of interest i.e. 10.45% per annum.



Since no possession has been delivered, as such, builder shall give cumulative interest till date. This amount shall be paid from due date of possession i.e. 16.1.2017. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of issuance of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

- (ii) As per the commitment made by the builder in his application for registration of the project, the due date of handing over the possession is 31.12.2019. If the builder in all probabilities fails to deliver possession on committed date, in that case, complainant shall be entitled to seek refund.

HARERA
GURUGRAM



28. The order is pronounced.

29. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 31.10.2018



HARERA
GURUGRAM

