

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 04.12.2018
Complaint No.	431/2018 case titled as Mr. Varun Attrey & anr. Vs. M/s Umang Realtech Pvt. Ltd. & anr
Complainant	Mr. Varun Attrey & Anr.
Represented through	Shri R.S. Yadav Advocate for the complainant
Respondent	M/s Umang Realtech Pvt. Ltd. & anr
Respondent Represented through	Shri Arpit Dwivedi, Advocate for the respondent.
Last date of hearing	27.9.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is registered with the authority.

Arguments heard.

As per clause 7.1 of the Apartment Buyer Agreement dated 3.1.2015 for flat/unit No.1203, 12th floor, Tower-1, "Winter Hills 77, Sector-77, Gurugram, possession of the booked unit was to be handed over to the complainant on **30.6.2016**. However, the respondent has failed to deliver the unit in time. Complainant has already deposited Rs.29,39,966/- out of total sale consideration of Rs.1,20,62,275/-. As such, complainant is entitled for delayed possession charges @ 10.75% per annum as per the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, till the actual handing over of possession failing which the complainant is

entitled to withdraw from the project and to get back the amount deposited by him with interest.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till handing over the possession shall be paid before 10th of subsequent month.

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

Samir Kumar
(Member)
4.12.2018

Subhash Chander Kush
(Member)
4.12.2018

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

Complaint no. : 431 of 2018
Date of institution : 14.06.2018
Date of decision : 04.12.2018

1. Mr Varun Attrey
 2. Mrs. Niyari Sharma
 3. Mr. Anil Kumar Sharma
- ...Complainants
- R/o 17, Madhya Marg, 2nd floor, DLF
City, phase 2, Gurugram- 122002.

Versus

1. Umang Realtech Pvt Ltd
 2. Anoop Sethi
 3. Manoj Talwar
 4. Jitender Singh
 5. Gaurav Verma
- ...Respondents
- R/o B-72, 7th floor, Himalya House,
Kasturba Gandhi Marg, Cannaught
place, New Delhi- 110001.

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri R.S. Yadav
Shri Arpit Dwivedi

Advocate for the complainant
Advocate for the respondent



ORDER

1. A complaint dated 09.08.2018 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 Mr. Varun Attrey and another against the respondent promoter Umang Realtech Pvt. Ltd. and another on account of violation of clause 7.1 of the apartment buyer agreement executed on 03.01.2015 for unit no. 1203 in tower I in the project "Winter Hills 77" for not giving possession by the due date which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid*.
2. Since, the buyer's agreement has been executed on 03.01.2015 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot be initiated retrospectively, hence, the authority has decided to treat the present complaint as an application for non compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint are as under: -



1.	Name and location of the project	Winter hills 77, Sector 77, Gurugram.
2.	Registered/not registered	Registered NO.RC/REP/HARERA/GM/2018/10 Dated 25.07.2018
3.	RERA Registration valid up to	31.12.2019
4.	Payment plan	Possession linked
5.	DTCP license number	67 of 2011 dated 16.07.2011
6.	Date of agreement	03.01.2015
7.	Unit area	1735 sq. ft.
8.	Unit no.	1203, 12 th floor, tower I
9.	Total sale consideration	Rs. 1,20,62,275/- (as per agreement)
10.	Total amount paid by the complainant	Rs 29,39,966/- (as per agreement)
11.	Date of delivery of possession As per clause 7.1 of apartment buyer's agreement: On the date when completion certificate is received+ grace period of 6 months	By 30.06.2016 (as per agreement, builder undertakes to complete the construction and apply for completion certificate by 31.12.2015)
12.	Penalty as per clause 7.1 of apartment buyers agreement	Rs 5 per sq. ft. per month
13.	Delay of number of months/ years till date	2 years 5 months 4 days



4. As per the details provided above, they have been checked as per record available in the case file provided by the

complainants and respondents. A builder buyer agreement is available on record for unit no 1203, tower I according to which the possession of the aforesaid unit was to be delivered by 30.06.2016. The promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 07.08.2018 and 30.08.2018 and 04.12.2018. The reply has been filed by the respondents which have been perused.

FACTS OF THE CASE:

6. That the complainants have booked a 3BHK flat with Umang Realtech in their project winter hills 77 located at Sector 77, Gurugram on 07.11.2014 and the complainant has made a payment of Rs 11,73,583 vide cheque No. 957317 dated 07.11.2014. an allotment letter was issued for the same.
7. That an apartment buyers agreement was executed on 03.01.2015 and unit no 1203 was allotted to the complainants having super area 1735 sq. ft. for total sale consideration of Rs 1,20,62,275/-



8. That as per clause 7.1 of the apartment buyers agreement had undertaken to complete the construction and apply for the completion certificate by 31.12.2015 subject to a grace period of six months and the possession of the apartment to the buyer shall be offered which the buyer has noted and confirmed. That as per clause 7.2 of the builder buyer agreement the respondent has mentioned that if construction is delayed due to the reason beyond control, the promoter shall be entitled to a reasonable extension of time for offering delivery of possession of the unit, and the company shall be liable to pay a sum of Rs 5 per sq. ft. of the super area per month as penalty.
9. That the respondents as per clause 7.1 were supposed to complete the construction by 31.06.2016 on receipt of sanction of building plan which was sanctioned by the DTCP Haryana dated 30.01.2012. Therefore as per the terms of the agreement, the respondents have failed to deliver possession.
10. That the respondents have violated section 4(d) of the Act ibid by which the respondents were supposed to maintain a separate account and keep 70% money realised from the complainants to cover the cost of constructions etc.



11. The respondents have neither delivered the possession on time nor has updated the status of the project or of the dues received and spent on the project.
12. That the complainants have visited the site several times and lodged protest against the stopping of construction. The respondents have not taken a notice of the protest, despite the fact that the complainants have made full payment as per the agreement.
13. That the complainants have suffered huge monetary loss, mental agony and harassment. Therefore the respondent is liable to pay the compensation.

ISSUE RAISED BY THE COMPLAINANTS:

14. The following issue have been raised by the complainants:
 - i. Whether or not the respondents have violated the terms and conditions of the apartment buyers agreement thereby delaying possession of the unit?
 - ii. Whether or not the respondents have obtained necessary approvals?

RELIEF SOUGHT BY THE COMPLAINANTS:

15. Following reliefs have been prayed for:



- i. The respondents may be directed to pay Rs 20,00,000 towards compensation for the damages, harassment and mental agony suffered by the complainants since adjudication of the complaint will take more time.
- ii. The respondents may also be directed to pay Rs 50,000, towards the legal expenses

REPLY BY THE RESPONDENT

16. The present complaint is filed without any cause of action and only on experimental basis. There is no deficiency of service or unfair trade practice on the part of respondent. As per clause 7.1 and 7.2 of the apartment buyer agreement, due date for handing over possession is 03.07.2018 plus a grace period of 6 months and as and when the completion certificate is received by the respondent.

17. Further the respondents submitted that since there is an arbitration clause in the agreement, complaint without invoking arbitration is liable to be dismissed. The relationship between the complainant and respondent is defined and decided by the apartment buyers agreement executed between both parties. It is submitted that a specific



clause for referring disputes to arbitration is included in the said agreement vide clause 14.6.

18. The respondents further submitted that there is no delay since the respondent is entitled for reasonable extension of time for handing over possession in terms of the agreed terms of the agreement. The respondent has given various reasons as to why there was delay in handing over the possession to the unit buyers therefore justifying himself of his obligation which he has failed.

19. The respondents also submitted that the complainant has suppressed material facts in relation to the status of project. The respondent no 1 is ready to shift the complainants booking in another project named "Monsoon Breeze ABLM Towers". It is submitted that the construction in the said project is complete and application has been filed for issuance of occupancy certificate. The respondents further submitted that the construction at winter hills 77, Gurugram is at final stage and respondent will be in a position to hand over the possession very soon.

20. The respondents submitted that the complainant has approached this hon'ble authority with unclean hands. The respondent submitted that the complainant has prayed for



relief for refund of amount paid which has to be claimed in a suit for recovery after paying appropriate court fee. In order to avoid payment of court fee, the complainant has not raised a dispute of a civil nature, which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of this hon'ble authority.

21. The respondents further submitted that the complainant is not entitled to seek any remedies beyond the terms of the agreement and the allegations in the present complaint cannot be decided summarily and thus this complaint is out of the jurisdiction of this hon'ble authority.
22. Lastly, the respondents submitted that he is bonafidely attempting to complete the project construction in a time bound manner considering the interests of its customers.

DETERMINATION OF ISSUES

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

- i. With respect to the **first issue** raised by the complainants, the authority came across that as per



clause 7.1 of buyer's agreement the possession of the said apartment was to be handed over by 31.06.2016. The clause regarding the possession of the said unit is reproduced below:

"7.1 Time of handing over the possession

...the company, subject to force majeure, undertakes to complete the construction and apply for the completion certificate by 31.12.2015, subject to a grace period of 6 months and as and when the completion certificate is received, possession of the said apartment to the buyer shall be offered which the buyer has noted and confirmed."

Accordingly, the due date of possession was 30.06.2016 and the possession has been delayed by 2 years 5 months 4 days till the date of decision. 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 beyond 31.12.2012 + 6 months grace period as per clause 7.9 of buyer's agreement which 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 others. (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.”

Keeping in view the present status of the project and intervening circumstances, the authority is of the considered opinion that the respondents have failed to deliver the possession of the unit number 1202 on 6th floor tower-I in the project ‘WINTER HILLS 77’, to the complainant by the committed date i.e. 30.06.2016 as per the said agreement and the possession has been delayed by more than 2 years 5 months 4 days till date. Thus, the complainants are entitled to interest at prescribed rate for every month of delay till the handing over of possession.



- ii. **With respect to the second issue**, the project is to be set up at Sector 77, Tehsil Gurugram, District Gurugram, State Haryana and the project is registered. The respondent has obtained the DTCP license no 67 of 2011 dated 16.07.2011 and the building plans have been

approved as per the information recorded in the agreement. However the respondent has not yet received the completion certificate/occupation certificate based upon which the respondent has to deliver possession of the sold units to the allottees. Thus, the respondent has failed in obtaining the necessary approvals and sanctions from the competent authorities.

FINDINGS OF AUTHORITY:

24. 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.

25. The authority is of the view of that the respondents have delayed the possession by approximately 2 years 5 months 4 days and thus is liable to hand over possession under section 11(4)(a).



26. The complainants made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter.

27. The complainants 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.

28. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) and Rule 15 of the rules proviso to pay interest to the complainants, at the prescribed rate, for every month of delay till the handing over of possession.

29. As per clause 7.1 of the apartment buyer agreement dated 3.1.2015 for flat/unit no.1203, 12th floor, tower-1, "Winter Hills 77, Sector-77, Gurugram, possession of the booked unit was to be handed over to the complainant on 30.06.2016. However, the respondent has failed to deliver the unit in time. Complainants have already deposited Rs.29,39,966/- out of total sale consideration of Rs.1,20,62,275/-

DECISION AND DIRECTIONS OF THE AUTHORITY:



30. 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 here by issues the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent was duty bound to hand over the possession of the said unit by 30.06.2016 as committed by the respondent.
- (ii) The respondent is directed to give interest to the complainant at the prescribed rate of 10.75% on the amount deposited by the complainant for every month of delay from the due date of possession i.e. 30.06.2016 till 04.12.2018 amounting to Rs. 7,67,242/- within 90 days of this order.
- (iii) Thereafter the monthly payment of interest amounting to Rs 26,337/- on 10th of every month of delay till the handing over of possession
- (iv) If the possession is not given on the date committed by the respondent then the complainant is entitled to withdraw from the project and get back the amount deposited by him with interest and shall be at liberty to further approach the authority for the



remedy as provided under the provisions, i.e.
section 19(4) of the Act ibid

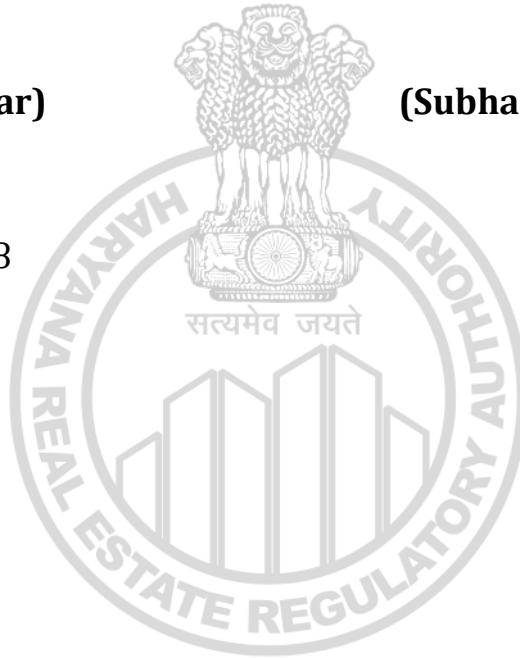
31. The order is pronounced.

32. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Date: 04.12.2018



HARERA
GURUGRAM



Judgement Uploaded on 05.01.2019