

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 05.12.2018
Complaint No.	443/2018 Case titled as Mr. Sailesh Agrawal Vs M/s Umang Realtech Pvt. Ltd.
Complainant	Mr. Sailesh Agrawal
Represented through	Shri Dheeraj Talwar, Advocate for the complainant.
Respondent	M/s Umang Realtech Pvt. Ltd.
Respondent Represented through	Shri Yash Varma, Advocate for the respondent
Last date of hearing	13.9.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Shri Dheeraj Talwar, Advocate appeared on behalf of the complainant and filed power of attorney.

Arguments heard.

As per clause 7.1 of the Builder Buyer Agreement executed inter- se the parties on 31.8.2012 for unit/flat No. E-502, Tower-E, Winter Hills 77, Sector-77, Gurugram, the possession of unit booked by the complainant was to be delivered to the complainant within a period of 36 months + 6 months grace period which comes out to be 30.6.2016.

Project is registered with the authority. Copy of registration certificate has been placed on record and the revised date for delivery of possession is

30.7.2019. Complainant has alleged that he has made a payment of Rs. 89,00,295/-, however, possession has not been delivered to the complainant by the respondent on the due date of delivery of possession i.e. 30.6.2016. In view of this, complainant is entitled to get prescribed rate of interest @ 10.75 % till the actual offer of possession.

However, respondent shall pay cumulative interest liability to the buyer within 90 days of this order and subsequent on 10th of every month. In case, the complainant/buyer if defaulted in making timely payment shall also be liable to pay interest to the respondent at the rate of 10.75% per annum on delayed payment which shall be adjusted against the interest of amount due from the respondent.

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

Samir Kumar
(Member)
05.12.2018

Subhash Chander Kush
(Member)
05.12.2018

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

Complaint No. : 443 of 2018
Date of first hearing : 9.8.2018
Date of Decision : 5.12.2018

Mr. Sailesh Agarwal,
R/o – Flat no 903, tower no 15,
The close north, Sector 50,
Nirvana country, Gurugram, South City 11,
Haryana-122018

Complainant

Versus

Umang Realtech Private Ltd.,
Address: B-72, 7th floor, Himalaya house,
KG Marg, New Delhi - 110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Dheeraj Talwar Advocate for the complainant
Shri Yash Varma Advocate for Respondent



ORDER

1. A complaint dated 14.6.2018 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. Sailesh

Agarwal, against M/s Umang Realtech Pvt. Ltd., in respect of apartment/unit described below in the project 'Winter Hills 77', on account of violation of the section 11(4)(a) of the Act ibid.

2. Since, the buyer's agreement has been executed on 31.8.2012 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: -

***DTCP licence no.:** 67 of 2011 dated 16.7.2011

***Licence holder:** Janpriya Buildestate Pvt. Ltd.

1.	Name and location of the project	'Winter Hills 77' Sector-77, Gurugram, Haryana.
2.	Registered / not registered	Registered (10 of 2018)
3.	Unit/ villa no.	E-502, 5 th floor, tower-E
4.	Unit measuring	1940 sq. ft'
5.	Total consideration	Rs.95,57,600/-
6.	Total amount paid by the complainants till date	Rs.89,00,295/-
7.	Percentage of amount paid	93.12%
8.	Date of execution of buyer's agreement	31.8.2012



9.	Payment plan	Construction linked payment plan
10.	Due date of delivery of possession Clause 7.1 – 36 months from the date of execution of agreement + 6 months grace period	30.6.2016
11.	Delay of number of months/ years upto 5.12.2018	2 years 5 months 5 days (approx.)
12.	Penalty clause as per builder buyer agreement	Clause 7.9 – Rs.5 per sq. ft' of super area per month

4. 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.
5. Taking cognizance of the complaint, the authority issued notice on 17.7.2018 to the respondent for filing reply and for appearance. The respondent appeared on 9.8.2018. The case came up for hearing on 9.8.2018. The reply on behalf of the respondent has been filed on .12.9.2018.

FACTS OF THE CASE

6. That the complainant booked the flat on 21.9.2011 vide cheque no. 713689 and 713690 dated 21.9.2011 for Rs.7,00,000 as advance. Subsequently, the respondent gave a photocopy of application form which was signed by the



complainant after which the respondent issued an allotment letter dated 13.3.2012 to the complainant.

7. Thereafter the respondents demanded payments time to time and the same were earnestly made to the tune of Rs.89,00,295/-. The complainant has made payment more than the basic sale price but there are numerous works yet to be done by the respondent company in the apartment. The respondent has stopped the construction midway long time back and has cheated the complainants.
8. That the respondent has already received payments for items such as club membership charges, external electrification charges, fire-fighting equipment charges, external development charges, etc. as on 2.11.2012 from the complainant for which not even a single penny has been spent.
9. That the respondent has also failed to obtain the required licences, approvals, sanctions etc., from the concerned authorities for the said group housing project.
10. That the respondent has received the amount of Rs.20,41,753/- i.e. more than 25% of the basic sale price from



the complainant and thereafter drafted the buyer's agreement as late as on 31.8.2012.

11. That the respondent vide e-mail dated 24.3.2018 made false commitments and the complainant replied to it vide e-mail dated 28.5.2018 wherein the complaint expressed their disbelief in respondent's claims.

12. That the news of stoppage of construction work of "Winter Hills 77" appeared in "Times of India" in December, 2017 and in "Dainik Jagran" on 27.12.2017.

13. The complainant visited the site in January, 2018 where it was observed that no construction activity was going on and there was no labour and no machinery on the construction site too.

14. **ISSUES TO BE DECIDED**

- i. **Whether the respondent has failed to deliver the possession of the unit and has violated the clauses of buyer's agreement?**
- ii. **Whether the respondent has failed to obtain the necessary licences, sanctions, approvals,**



- occupation certificate, etc., from the competent authority?
- iii. Whether the respondent has acted fraudulently by changing the words “giving possession of the flat by 31st March 2015” in the application form to “completion of construction work by 31st December 2015” in the buyer’s agreement?
- iv. Whether the respondent has unlawfully taken club membership, external development charges, car parking charges, etc. before even starting construction of 2nd floor?
- v. Whether the respondent has failed to get its housing project registered with RERA?
- vi. Whether the respondent has caused extreme financial crisis and extensive harassment to the complainant by not completing the housing project at time?



15. RELIEF SOUGHT

- i. To direct the respondent to refund the entire amount of Rs.89,00,295 along with interest @15% per annum till 31.5.2018.**
- ii. To direct respondent to refund the rent payments to the complainant to the tune of Rs.11,45,430/-.**
- iii. To direct the respondent to compensate the complainant with Rs.25,00,000.**
- iv. To put heavy penalties and punishments upon the respondent.**
- v. To direct the respondent to pay Rs. 20,000/- for litigation expenses.**
- vi. Any other relief which this authority may deem fit and proper.**



REPLY ON BEHALF OF RESPONDENT

16. That the present complaint has been filed without any cause of action as there is no deficiency of service by the respondent. Clause 7.1 and 7.2 of the buyer's agreement

provides the due date of possession as 31.12.2015 plus 180 days grace period. Clause 7.1 provides:

“notwithstanding the provision mentioned in the application form in respect of date of 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.”

17. That there is an arbitration clause in the agreement under clause 14.6 and the present complaint without invoking arbitration is liable to be dismissed.
18. That there was no delay since the respondent was entitled for reasonable extension of time for handing over possession as per the agreement. Clause 7.2 of the agreement provides:

“if the completion of the construction of the complex is delayed by reason of war or enemy action or earthquake or any act of god, or if non delivery of possession is a result of any statute, notice, order, rule or notification of the judiciary/ government and/or authority, or for any other reason beyond the control of the developer, delay in issue/grant of completion certificate by the concerned authorities to the company (such delay not being caused due to default of the company), scarcity or unavailability of any construction material or for any other reason beyond the control of the company therein any of the aforesaid events the developer shall be entitled to a reasonable extension of time for offering delivery of possession of the said apartment.”



19. That due to global recession, the number of bookings made and money received from the allottees reduced drastically in comparison to the expected bookings anticipated by the respondent at the time of launch of the project. This resulted in less cash flow thereby causing delay in construction of the project.
20. That there were various problems which led to the delay in construction such as lack of adequate finance, shortage of labour, rising material costs, approvals and procedural difficulties, shortage of water, shortage of bricks due to restrictions by ministry of environment and demonetization. These problems were beyond the control of the respondent and fall under clause 7.2 of the buyer's agreement.
21. That the respondent has suppressed material facts and has not come to this authority with clean hands. The complainant has falsely averted that construction of the project is nowhere near completion. The respondent has taken loan of Rs.75 crores to complete the remaining project out of which



Rs.40 crores has already been disbursed by JM financial. The construction is on full swing with 750 workers on site.

22. That the complainant has been making regular default in making payments as per the payment plan opted by him. The demand of Rs.5,65,171 for internal plaster raised on 29.7.2017 is still pending and the complainant has to also pay Rs.1,26,990 for delay in payment of demands.

23. That the complainant has to avail alternate remedies first instead of approaching this hon'ble authority. Also, the complainant cannot seek any other remedy beyond the terms of the buyer's agreement. It is a well settled principle that the courts cannot generate altogether a new contract. The courts have to only interpret the existing contract and decide the rights and liabilities of the parties within four corners of the contract.

24. That the present complaint involves complicated questions of facts and law which necessarily entails leading of copious evidence. The issues raised by the complainant cannot be addressed in a consumer complaint before this authority which follows a summary procedure.



25. That the respondent is bonafidely attempting to complete the construction in time bound manner and considering the interests of its customers it has applied for registration of its project on 10.4.2018 under section 3 of RERA.

26. That the respondent is making all the endeavour to complete the construction in the project by January, 2019 and thereafter possession will be offered soon after grant of occupation certificate from the concerned authorities.

REJOINDER BY COMPLAINANT

27. That in the case of **Aftab Singh v/s Emaar MGF Land Limited** consumer case no.701 of 2015-NCDRC (affirm by the supreme court in civil appeal no.(s) 23512-23513 of 2017), it was held that the matters like testamentary disputes, disputes relating to trusts, insolvency disputes, consumer disputes and disputes within the jurisdiction of RERA cannot be decided by arbitration as there is involvement of huge public interest. Therefore power of special courts or forums cannot be superseded by arbitration clause in the agreement.

28. That the respondent is not entitled to invoke clause 8(a) of the agreement as if it had acted fairly then it could have very



easily completed the construction before the committed period. Moreover, there are no valid reasons which are beyond the control of respondents under clause 7.2.

29. That the non-booking of apartments was not because of recession but purely because of the bad track record of respondents and unfair demand of payments.

30. That there cannot be lack of adequate sources of finance because the respondent has already collected much more payment against the basic selling price. Also, it has collected fee for club, fire-fighting equipment, car parking, etc for which not a single penny has been used.

31. That the respondent has earlier said that there was recession and then said that there was shortage of labour which is contradictory because in cases of recession the level of unemployment increases and labour becomes surplus. Moreover, the excuse of expensive material cost is also wrong as during the recession period, manpower becomes extremely cheap and the materials are also available at cheap prices.



32. The other reason of approvals and procedural difficulties given by the respondent is also wrong as these approvals are same for all developers in Gurugram and other builders have taken these approvals and licences.
33. That there was no extreme shortage of water and bricks as alleged by the respondent as the other developers in the region have carried out their construction work smoothly. Moreover, the respondent has mentioned in it's reply that it would complete the construction by 2019 and if there is extreme shortage of water and bricks then how can it complete the construction work now so quickly.
34. That the respondent has very strangely raised the factor of demonetization to have affected the construction work. It is well known that demonetization was announced in the end of 2016 whereas the respondent was required to complete the construction by 31.12.2015.
35. That the respondent fooled the innocent complainant and other buyers by receiving more than 25% amount without executing any agreement. The complainant had to pay



Rs.20,41,753 before the agreement was executed because of continuous demands of the respondent.

36. That the respondent dishonestly changed the date in application form from 31.3.2015 to 31.12.2015 in the buyer's agreement. The complainant had no other option to sign this agreement because more than 25% of the payment was already received by the respondent.

37. That the respondent has made false submission before this authority regarding non-timely payment of instalments by the buyer. Instead, the complainant has made timely payments and all the demands have been met which is clear from the photocopies of the receipts on pages 46-76 as well as from details of total payments made to the respondent on page 45.

38. That the respondent has mentioned that the complainant has not come to this authority with clean hands but the fact is that the respondent is itself not genuine which can be seen from the complaints from over 100 people against it in the NCDRC in case no 333/2018.



39. That the point raised by the respondent for alternate remedies is baseless because Haryana RERA is established for fast-track dispute resolution and RERA is considered to be one of the landmark legislations passed by the government of India.
40. That the respondent has misled the authority by not mentioning in its reply that the association of flat buyers have filed a complaint against it in the NCDRC.

DETERMINATION OF ISSUES

41. With respect to the **first issue**, the clause 7.1 of the buyer's agreement provides:

“notwithstanding the provision mentioned in the application form in respect of date of 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.”

It is clear from this clause that the due date of possession of the unit in question was 30.6.2016 and the respondents have failed to offer possession by the said date and have delayed by 2 years 5 months 5 days (approx.) till date.



42. With respect to the **second and fifth 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.
43. With respect to the **third issue**, the authority came across clause 14 of the application form signed inter se both the parties which is reproduced hereunder:

“the company shall endeavour to give possession of the flat to the applicant by 31.3.2015 with a reasonable extension of 6 months, subject to force majeure circumstance and reasons beyond the control of the company.”

Then clause 7.1 of the buyer’ agreement was looked into which provided that:

“notwithstanding the provision mentioned in the application form in respect of date of 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.”

Careful reading of these two clauses shows that the respondent has changed the date of possession from



31.3.2015 in application form to 31.12.2015 in the buyer's agreement.

44. With respect to the **fourth issue**, the payment plan attached on page no. 38 provides for parking charges and the restoration of allotment offer dated 20.4.2015 provided it to be separate and in addition to the basic sale price which was then agreed to by the complainant. Also, letter dated 23.4.2013 by the respondent says that the car parking was to be in addition to the basic sale price of Rs.8750. Moreover, there is no document in support of the allegation by the complainant that the car parking was to be included in the basic sale price.

45. With respect to the **sixth issue**, the issues relating to compensation are to be dealt by the adjudicating officer and this authority has no jurisdiction to entertain the same.

FINDINGS OF THE AUTHORITY

46. 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 complainants at a later stage.

47. For the issue of arbitration clause raised by the respondent, the amendment of Section 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.

48. In the present complaint, the complainants are seeking refund of the entire money paid till date i.e.89,00,295/- along with interest @ 15% p.a. till 31.5.2018. However, the complainant will be entitled to a prescribed rate of interest till the date of handing over of possession.

DECISIONS AND DIRECTIONS OF THE AUTHORITY

49. 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 clause 7.1 of the builder buyer agreement executed inter- se the parties on 31.8.2012 for unit/flat No. E-502, tower-E, Winter Hills 77, Sector-77, Gurugram, the possession of unit booked by the complainant was to be delivered to the complainant within a period of 36 months + 6 months grace period which comes out to be 30.6.2016.
- (ii) Project is registered with the authority. Copy of registration certificate has been placed on record and the revised date for delivery of possession is 30.7.2019. Complainant has alleged that he has made a payment of Rs. 89,00,295/-, however, possession has not been delivered to the complainant by the respondent on the due date of delivery of possession i.e. 30.6.2016. In view of this, complainant is entitled to get **Rs. 23,25,329** as per prescribed rate of interest @ 10.75 % till the actual offer of possession.



(iii) However, respondent shall pay cumulative interest liability of **Rs. 23,25,329** to the buyer within 90 days of this order and subsequently **Rs.79,731.81** on 10th of every month till the date of offer of possession. In case, the complainant/buyer if defaulted in making timely payment shall also be liable to pay interest to the respondent at the rate of 10.75% per annum on delayed payment which shall be adjusted against the interest of amount due from the respondent.

50. The order is pronounced.

51. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:5.12.2018



Judgement uploaded On 05.01.2019