

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

Complaint no. : 135 of 2018
Date of institution : 05.04.2018
Date of decision : 29.11.2018

1. Mr. Himanshu Gautam
2. Divya Gautam
Both R/o. 2261, ATS One Hamlet
Sector 104, Gautham Budh Nagar,
Uttar Pradesh-201304.

Complainants

Versus

1. M/s Ramprastha Promoters & Developers
Pvt. Ltd.
Address: 114 Sector 44, Gurugram,
Haryana-122002
2. M/s Bluebell Protech Pvt. Ltd.
Address: C-10, C-Block Market,
Vasant Vihar, New Delhi-110057.

Respondents

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Vardhman Kaushik
Shri Dheeraj Kapoor
Shri Shobhit Maheshwari

Advocate for the complainant
Advocate for the respondent
Authorised representative on
behalf of the respondent.

ORDER

1. A complaint dated 05.04.2018 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. Himanshu Gautham and Divya Gautam, against the promoter Ramprastha Promoters & Developers Pvt. Ltd., on account of violation of the clause 15(a) of builder buyer agreement executed on 21.09.2011 in respect of apartment described as below for not handing over possession on the due date i.e. 31.12.2014 which is an obligation 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	"SKYZ", sector 37D, Gurugram, Haryana.
2.	Flat/apartment/unit no.	1702, 17 th floor, tower F.
3.	Registered/unregistered	Registered
4.	RERA registration no.	320 of 2017
5.	Date of completion as per RERA registration certificate.	31.03.2019
6.	Date of execution of BBA	21.09.2011
7.	Total consideration amount as per agreement dated 21.09.2011	Rs. 77,26,478/-
8.	Total amount paid by the complainant till date	Rs. 71,87,000/- as per complaint
9.	Percentage of consideration amount	Approx. 93 %
10.	Date of delivery of possession as per clause 15(a) of builder buyer agreement	31.08.2014 plus 120 days grace period i.e. 31.12.2014
11.	Delay of number of years / months/ days till date	3 Years 11 months approx.



12.	Penalty clause as per builder buyer agreement dated 21.09.2011	Clause 17(a) of the agreement i.e. Rs.5/- per sq. ft per month of the super area till the date of possession.
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3. As per the details provided above, which have been checked as per record available in the case file. A builder buyer agreement is available on record for the aforesaid apartment according to which the possession of the same was to be delivered by 31.12.2014. The respondent company has not delivered the possession till date. Neither they have delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.5/- per sq. ft per month of the super area of the said flat for the period of such delay as per clause 17(a) of builder buyer agreement dated 21.09.2011.
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The respondent appeared on 15.05.2018. The case came up for hearing on 15.05.2018, 19.06.2018, 11.07.2018, 21.08.2018, 29.08.2018, 09.10.2018, 26.10.2018 and 29.11.2018. The reply has been filed on behalf of the respondent on 07.06.2018 which has been perused. The complainant filed the rejoinder to rebut the reply filed by the respondent in which the complainant reaffirmed the contentions given in the complaint.



5. Briefly stated, the facts of the case as culled out from the case of complainant are that vide allotment letter dated 23.08.2011, flat no. 1702 measuring 1750 sq. ft. on 17th floor at block no. B was allotted to the complainant in the “SKYZ” project situated at Ramprastha City, sector 37D, Gurugram. The complainant paid an amount of Rs.11,58,000/- towards the booking amount. The complainant along with respondent no. 1 entered into a tripartite home loan agreement with HDFC for a loan amount of Rs.63,00,000/- on 16.09.2011. Thereafter, flat purchaser’s agreement was executed on 21.09.2011 with respondents. As per clause 15(a) of the agreement the physical possession of the flat will be handed over to the complainant by 31.08.2014.

The payment schedule as per Annexure II of the agreement is as follow:

S.No.	Stages	Payment (% of total cost)	Instalment
1.	On Booking	15%	11,58,972/-
2.	On Invoicing for start of construction	75%	57,94,859/-



3.	On Invoicing for receipt of occupation certificate	5%	3,86,324/-
4.	On Invoicing for possession	5%	3,86,324/-
	Total		77,26,478/-

Note: Service tax as applicable

6. In the meanwhile, the complainants requested HDFC to reduce the loan amount to Rs.60,29,000/- and the same was granted by the bank vide letter dated 23.09.2011. In pursuant to clause 6 of the tripartite home loan agreement a sum of Rs.40,53,427/- was released by HDFC towards the respondent no. 1 and further a sum of Rs.15,98,000/- was adjusted against loan processing of subvention on 23.09.2011.
7. The complainant vide email dated 18.07.2014 expressed their concern regarding the delay in construction and handing over of possession of the apartment by the respondents. The complainant also demanded that required formalities be done with HDFC Bank by respondent to ensure that the complainants do not have to pay the EMIs which were due to start as on the



schedule date of possession, as the respondents have defaulted in timely construction of the project. The complainants stated that the possession of the flat has not been handed over to the complainant till date and they have been continuously paying EMI for the financed loan amount from 2014 till date.

8. The complainants submitted that on the request of them the loan amount of Rs. 63,00,000/- was reduced to Rs. 60,29,000/-. Thus the total amount incurred by complainants towards payment to the respondents has been Rs. 11,58,000/- as initial payment and Rs. 60,29,000/- which has been obtained through a loan from HDFC. While a major component of the loan has been disbursed by the bank, the EMI is being incurred by the complainants for the entire amount borrowed.

9. Issues to be decided

- i. Whether the respondent is liable to refund the amount paid by the complainant along with interest and if yes to what extent.



10. Relief sought

- i. Direct the opposite party(s) for an immediate 100% refund of the total amount of Rs. 71,87,000/- paid by the complainant, along with a penal interest of 10.15 % compounded annually from the date of the receipt of the payments made to the opposite party(s) amounting to a total compensation of Rs. 1,34,72,460/-.

11. Respondent's reply:

The facts stated by the respondent in his reply are as follow:

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

- i. The complaint for compensation and interest under section 12,14,18 and 19 of the act ibid is maintainable only before the adjudicating office.
- ii. The complaint is not supported by any proper affidavit with a proper verification.
- iii. The respondent also stated that the statement of objects and reasons as well as the preamble of the said act clearly states that the RERA is enacted for effective consumer protection and to protect the interest of consumers in the real estate project. In



the present complaint the complainants are already the owners and residents of C-804, Alaknanda apartments, Plot no. 45, Sector 56, Gurugram as mentioned in in the booking application form and 2261, ATS One Hamlet, Sector 104, Gautam Budh Nagar, Uttar Pradesh-201304 (address mentioned in the present complaint). Therefore, the complainant is an investor.

- iv. The complainants have been defaulter and have deliberately failed to make the payments of various instalments within the time prescribed, which resulted in outstanding dues and delay payment charges.
- v. The authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the BBA and no such agreement as is referred under the provisions of the said Act. Rather, the agreement that has been referred to is dated 21.09.2011 which is to be executed much prior to coming into force of the said Act or said Rules.
- vi. The respondent has submitted that despite several adversities, the respondent continued the construction of the project and should be able to apply for occupation certificate for the apartment in question by 31.03.2019 (as mentioned at the time of registration of the project with HRERA).



12. The respondent submitted that the proposed estimated time of handing over the possession of the said apartment was 31.08.2014 + 120 days + 6 months + 4 months and not 31.08.2014, as alleged by the complainants.
13. The respondent also submitted that the said proposed time is applicable only subject to force majeure and the complainants having complied with all the terms and conditions and not being default of any terms and conditions of the BBA, including but not limited to the payment of instalments. In case of any default/delay in payment, the date of handing over of possession shall be extended accordingly solely at the respondent's discretion, till the payment of all outstanding amounts and the same was provided under clause 15 of the agreement.
14. The respondent further submitted that the section 19(4) of the said Act provides that the allottee shall be entitled to claim the refund of the amount paid along with interest at such rates as may be prescribed and the compensation in the manner as provided in the Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment as the case may be, in accordance with the terms of agreement for sale. Also, as per section 19(3) provides that the allottee shall be entitled to claim the possession of the apartment as per the declaration given by the promoter under section 4(2)(I)(C) of



the Act *ibid*. Thus, conjoint reading of both the provisions as aforementioned, shows that the entitlement to claim the possession or refund would only arise once the possession has not been handed over as per declaration given by the promoter under sub clause (c) of clause (l) of subsection 2 of section 4. In the present case, the respondents had made a declaration in terms of section 4(2)(l)(c) that the respondent would complete the project by 31.03.2019. Thus, no cause of action can be said to have arisen in to the complainants.

15. The respondent also submitted that projects, such as the one in question, are huge projects and involve putting in place huge infrastructure and is dependent on timely payment by all the allottees. Such huge projects do take some reasonable time for completion and timelessness are not absolute. The parties have agreed to a specific condition as per clause 17 of the agreement that in case the respondent fails to offer possession of the apartment within the committed period, it shall be liable to pay delay compensation @5/- per sq. ft. per month of the super area till the date of possession.

16. The respondent further submitted that the letter issued by the bank for reduction in the loan amount does not concern the respondent as the complainant are responsible for arranging



their own funds and making payments as per the terms and conditions of the agreement.

17. The respondent denied the fact that the sum of Rs.15,98,000/- was adjusted against the loan processing of subvention. The respondent submitted that as per tripartite agreement, the respondents were only required to pay EMI's 31.08.2014 and not beyond the said date. The amount of Rs.15,98,761 were adjusted by the HDFC bank towards the EMI'S required to be paid by the respondent, on behalf of the complainant, to the HDFC bank from 23.09.2011 till 31.08.2014 as per tripartite Agreement and it was only after the adjustment of this amount that out of total amount of Rs. 56,52,188/-, the balance amount of Rs.40,53,427 was released by the HDFC bank.

18. **Determination of issues:**

- i. Regarding **first issue**, the refund cannot be allowed in the present case as the project is almost complete. The respondent has committed to complete the project by 31.03.2019 as per HRERA registration certificate. Allowing refund at this stage will hamper the development of the said project and will also adversely affect the interest of other allottees in the said project and the complainant can seek compensation from the adjudicating officer under the RERA. However, they committed



a default in doing the same and thus, they are liable to pay delayed interest under section 18(1) proviso to pay to the complainant interest, at the prescribed rate of 10.75%, for every month of delay till the handing over of possession.

19. As per clause 15(a) of builder buyer agreement, the possession of the flat was to be handed over by 31.12.2014. The clause regarding the possession of the said unit is reproduced below:

“15(a) Time for handing over the Possession

Subject to terms this clause and subject to the allottee having complied with all the terms and conditions of this agreement and the application, and not being defaulter under any of the provisions of this agreement and compliance with all the provisions, formalities, documentation, etc. as described by the developers, developer propose to hand over the possession of the apartment by 31.08.2014. the allottee agrees and understand that the developers shall be entitled to a grace period of 120 days, for applying and obtaining the occupation certificate in respect of Group Housing Complex.”

20. Accordingly, the due date of possession was 31.12.2014. The delay compensation payable by the respondent @ Rs. 5/- per sq. ft. per month of the super area of the said flat as per clause 17(a) of builder 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.”

21. As the possession of the flat was to be delivered by 01.01.2015 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Act *ibid* read with rule 15 of the rules *ibid*.

Findings of the authority

22. 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.
23. The complainant makes a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above. 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.

24. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay to the complainant interest, at the prescribed rate, for every month of delay till the handing over of possession. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.
25. Keeping in view the present status of the project and intervening circumstances, the authority is of the view that in case refund is allowed in the present complaint, it shall hamper the completion of the project. The refund of deposited amount will also have adverse effect on the other allottees. As per proviso to section 18(1) of the Act, if the complainant does not intend to withdraw from the project, he shall be paid interest for every month of delay till the handing over of the possession.



Decision and directions of the authority

26. The authority is of the view that the project is registered. As per builder buyer agreement dated 21.09.2011, the due date of possession was 31.12.2014. However, the respondent has given a revised date of possession i.e. 31.03.2019 which is agreed upon by both the parties.

27. Thus, the authority, exercising powers vested in it under section 37 of the Real Estate (Regulation And Development) Act, 2016 hereby issue the following directions to the respondent:

- i. The respondent is directed to give the physical possession of the said flat to the complainant by the date committed by the respondent i.e. 31.03.2019 for handing over the possession failing which the complainant is entitled to withdraw from the project.
- ii. The respondent is directed to give interest to the complainants at the prescribed rate of 10.75% i.e. **Rs. 30,22,674.99/-** for every month of delay from the 01.01.2015 till 29.11.2018 within 90 days of this order on



the amount deposited by the complainants i.e. **Rs. 71,87,000/-** .

- iii. Thereafter, the monthly payment of interest i.e. **Rs. 64,383.54/-** till handing over of the possession, so accrues shall be paid by 10th of every succeeding month.
28. The order is pronounced.
29. 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: 29.11.2018

HARERA
GURUGRAM

Judgement Uploaded on 05.01.2018



PROCEEDINGS OF THE DAY

Day and Date	Thursday and 29.11.2018
Complaint No.	135/2018 case titled as Mr. Himanshu Gautam & another Vs. M/s Ramprastha Promoters and Developers Pvt. Ltd
Complainant	Mr. Himanshu Gautam & another
Represented through	Shri Vardhman Kaushik, Advocate for the complainant.
Respondent	M/s Ramprastha Promoters and Developers Pvt. Ltd.
Respondent Represented through	Shri Shobhit Maheshwari, authorized representative on behalf of the respondent-company with Shri Dheeraj Kapoor, Advocate.
Last date of hearing	26.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

On perusal of the record, it has come to the notice of the authority that the project is registered. As per Builder Buyer Agreement dated 21.09.2011, the due date of possession was 31.12.2014. However, the respondent has given a revised date of possession i.e. 31.3.2019 which is agreed upon by both the parties.

Keeping in view the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, complainant is entitled for interest at the prescribed rate of 10.75% per annum w.e.f. 1.1.2015 till handing over

the offer of possession by revised date of possession i.e. 31.03.2019, failing which the complainant is entitled to withdraw from the project.

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 shall be paid before 10th of subsequent month.

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

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
29.11.2018