

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 04.12.2018
Complaint No.	478/2018 case titled as Mr. Kinker Mukherjee Vs. M/s Imperia Structure Ltd.
Complainant	Mr. Kinker Mukherjee
Represented through	Complainant in person with Shri Rajeev Yadav, Advocate.
Respondent	M/s Imperia Structure Ltd.
Respondent Represented through	Shri Gautam Talukaar, Advocate for the respondent.
Last date of hearing	19.9.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Arguments heard.

Complainant booked an apartment No.H403, Tower-H, "The Esfera" Sector 37-C Gurugram with the respondent but no Builder Buyer Agreement was executed inter-se the parties. Till date the respondent has failed to deliver the booked unit to the complainant. However, there were certain defaults on the part of the buyer as he failed to deposit certain construction linked instalments. Complainant has deposited only Rs.18,52,052/-+ Rs.2 lakhs. However, builder being in a dominating position took a unilaterally decision and cancelled the allotment of the complainant and refunded an amount of Rs.11, 08,148/- after forfeiting balance amount of Rs.8 lakhs. However, the complainant has brought on record that it was a pre-launch

project. The building sanction plan has been received by the builder on 18.12.2012. The project is complete and delivered to various allottees. However, it has come on record that the complainant did not get his cheque encashed. Keeping in view all facts and circumstances on record, complainant is entitled to get his cheque encashed issued to him. It may not tantamount to marrowing his refund amount. Builder is liable to refund the amount in lieu of cheque issued earlier within 60 days. In addition to this respondent is also directed to refund the amount of Rs.2 Lakhs which was accepted by them in later stage. Any more money charged by the builder by way of defrauding the complainant shall also be refunded.

Complaint stands 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. : 478 of 2018
First date of hearing: 23.08.2018
Date of decision : 04.12.2018

Dr. Kinker Mukherjee
R/o Flat no. 373, block N, Mayfield Garden,
Sector 51, Gurugram **Complainant**

Versus

M/s Imperia Structure Ltd
A-25, Mohan Cooperative Industrial Estate,
New Delhi **Respondent**

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush **Member
Member**

APPEARANCE:

Shri Rajeev Yadav Advocate for the complainant
Dr. Kinker Mukherjee Complainant in person
Shri Gautam Talukaar Advocate for the respondent

ORDER

1. A complaint dated 25.06.2018 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 Dr. Kinker Mukherjee, against the promoter M/s Imperia Structure Ltd.



2. Since, the allotment letter dated 10.02.2012 issued by the respondent i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot 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 case are as under: -

1.	Name and location of the project	The Esfera, Sector 37 C , Gurugram
2.	Nature of the project	Residential
3.	RERA registered/ not registered.	Not registered
4.	Apartment/unit no.	H403, tower H
5.	Apartment measuring	1435 sq. ft.
6.	Payment plan	Instalment linked payment plan
7.	Date of execution of buyer's agreement	Not executed
8.	Basic sale price as per the welcome letter	Rs.3456/- per sq. ft.
9.	Total consideration	Rs.19,50,595/- (Annexure C 5)
10.	Total amount paid by the complainant	Rs. 18,52,052/- + 2,00,000/- in addition



4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondent. A buyer's agreement is not executed.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through his counsel appeared on 23.08.2018. The case came up for hearing on 23.08.2018 and 04.12.2018. The reply has been filed by respondent on 19.09.2018 has been perused.

Facts of the case

6. The complainant submitted that he has booked the residential apartment with builder M/s Imperia Structure Ltd. on dated 01.02.2012 in their project "The Esfera" for the property bearing flat no. 403, ad-measuring 1435.SQFt (super area) @ of basic sale price of Rs. 3456/- per sq. ft. in tower H, Imperia Esfera Sector 37 C, Gurugram with the respondent.
7. The complainant submitted that respondent issued acceptance letter and welcome letter on dated 10.02.2012 subject to the booking made by the complainant in respondent residential apartment project.



8. The complainant submitted that complainant has paid the total booking amount of Rs. 5,30,000/- vide cheque no. 565627 for an amount of Rs. 1,00,000/- drawn from State Bank of India and cheque no.104939 for an amount of Rs. 4,30,000/- drawn from ICICI Bank to respondent namely M/s Imperia Structure Ltd.
9. The complainant submitted that complainant also made payment for an amount of Rs.4,89,308/ to the respondent subject to consideration of the flat.
10. The complainant submitted that respondent issued the letter on 05.06.2012 for confirmation of the allotted unit/flat no. H 403, ad-measuring 1435. sq. ft. @ of basic sale price of Rs. 3456/- in tower H, Imperia Esfera Sector 37 C, Gurugram. The copy of the confirmation letter dated 05.06.2012.
11. The complainant submitted that respondent raised the demand letter dated 24.09.2012 for payment of installment of flat, in which it was confirmed by him that amount of Rs. 10,19,308/- was received.
12. The complainant submitted that he also made payments respect to said unit vide through two different cheque bearing no. 172653 and 387659 dated 12.12.2012 for an amount of Rs.300000/- each to respondent/builder. That the



complainant made total payment of Rs. 6,00,000/- vide through the above mentioned two cheque.

13. The complainant submitted that complainant has also paid an amount of Rs 3,00,000/- on 09.08.2013 through cheque bearing no.530263.

14. The complainant submitted that he had made total payment subject to the said residential unit of Rs. 19,19,308 till the year 2013.

15. The complainant submitted that complainant has paid each and every demand against the above said allotted unit/flat as per the payment schedule but due to some uncontrollable circumstances complainant fails to make further payment of allotted unit, the respondent builder sent a letter of forfeit of allotted unit/flat and charged an earnest money of Rs.8,11,160/-.

16. The complainant also submitted that on 04.10.2013, the respondent builder issued a cheque bearing no. 076011 for Rs. 11,08,148/- after deducting of an earnest money of the complainant amount.

17. The complainant submitted that complainant further approached the respondent builder to restoration of the allotted unit in their project, but the respondent builder fails



to make it possible. Instead they had raised arbitrary condition for restoration of the said unit enhancing the unit price along with interest and penalty. After that, the respondent builder offered a new rosy project for commercial shop in their project namely Imperia Wishfield Pvt. Ltd. and assured to adjustment of paid amount in it.

18. The complainant submitted that complainant accepts the same offer of respondent builder for unit 260 sq. ft. shop in their project and same was duly booked by complainant by paying amount of Rs. 200000/- towards their project "ELVEDOR RETAIL".
19. The complainant submitted that respondent builder arbitrary cancel the booked commercial shop and the respondent builder had again make new proposal to complainant to buy a studio apartment in their Noida project i.e. Knowledge Park V, in lieu of the money already paid by the complainant. The respondent/builder from day one of the booking in their project cheated the complainant through his arbitrary conduct into every fake deal and is trying to grab the hard-earned money of the complainant.
20. The complainant submitted that the respondent/builder had got approval of building site plan (BR- III) on dated 18.12.2012



i.e. much later then the booking and collecting a few installments on the part of the complainant.

21. The complainant submitted that the respondent builder got the environment clearance certificate approval on 15.04.2014 more than 2 years after launching the project and was allotted to so many investors like complainant in the project.
22. The complainant submitted that the respondent/builder had collected the booking amount from complainant on 29.01.2012 and 6.02.2012 and subsequent installments dated 29.05.2012 and dated 12.12.2012 much before the building approval of site plan that was dated 18.12.2012. Moreover, the respondent has collected the huge money not only from the complainant but also from many other persons who booked any unit in the project of the respondent.
23. The complainant submitted that the project of the respondent builder is failed to fulfill government norms despite that the respondent builder collected the money from the complainant for the said project and thereby, the respondent builder had made wrongful loss to complainant and wrongful gain to himself, an amount of Rs. 21,19,308/- and thereby cheated the complainant.



24. The complainant submitted that the complainant has requested many time to respondent to refund his hard earn income which they kept itself illegally and arbitrarily and with intention to give wrong full loss to complainant and gain to himself.

25. The complainant submitted that present complaint is going to be filed before this hon'ble authority within the limitation period and without any delay.

Issues to be decided:

- i. Whether the promoter has caused delay in providing the possession of the property?
- ii. Whether the promoter has registered itself as per RERA compliances?
- iii. Whether the respondent has breached the flat buyer's agreement by not delivering the possession of the apartment and there is no reasonable justification for the delay?
- iv. Whether the facilities and amenities as agreed upon / approved in the layout plan have not been provided?
- v. Whether the complainant is entitled for refund, interest and compensation along with damages?



Reliefs sought:

The complainant is seeking the following relief:

- i. Respondents be directed to refund the principal amount along with interest to the complainant.

Respondent's reply

26. The respondent submitted that the complainant was refunded the amount of Rs.11,08,148/- by the respondent way back in the year 2013 itself. No specific denial was made by the complainant about the receiving and contents of the demand notice issued on 16.07.2013, 31.07.2013 and 12.08.2013. It is the case of the answering respondent that the allotment in favor of the complainant stands cancelled since he was unable to comply with the terms and conditions of the application form of allotment.

27. The respondent submitted that it is important to bear in mind that the respondent communicated to the State Environment Impact Assessment Authority (hereinafter "SEIAA") of Haryana on 11.02.2013 seeking environmental clearance for the project and same was followed up on 18.03.2013. Further, in view of the communications forwarded by the answering respondent in this regard, a meeting took place on 10.05.2013



at SEIAA to discuss about the permission sought by the respondent in the present matter.

28. The respondent submitted that respondent again followed up with the SEIAA on 05.09.2013 in this regard. Further, based on the representations made by the respondent, meetings took place in the SEIAA, Haryana on 08.10.2013 follow up by another meeting on 23.10.2013. Further, in the meeting held on 19.03.2014, the competent authority agreed to grant environmental clearance to the respondent subject to fulfilment of certain conditions.

29. The respondent submitted that as far as the complainant's complaint and reliefs are concerned, the calculation by which the complainant arrived at the figure of Rs.21,19,308/- was not set out at page 16 of the complaint. Further, the complainant also prays for interest amount @ 24% per annum and arbitrarily calculated the same to be Rs.18,22,605/- and also sought a compensation for delay in possession of Rs.10 lacs. While arriving at the figures as reflected at page 16 of the paper book, no criteria was given based on which such relief of Rs.49,41,913/- was sought by the complainant. Since no specific parameters were taken into account and finds no mention in the complaint, thus the prayer mentioned by the complainant is denied *in toto*. It is further submitted that same



is vague and arbitrary and based on conjunctures and surmises.

30. The respondent submitted that further, the complainant has annexed a document dated 28.04.2014 at page 32 of the paper book where it has been alleged by the complainant that he booked a shop of 260 sq. ft. by paying Rs. 2,00,000/- vide a cheque dated 17.10.2014 in favor of Imperia Wishfield Private Limited. Pursuant to that, the present complaint was filed on 21.04.2018.

31. The respondent submitted that the complainant made no specific denial that the complainant received a refund of Rs.11,08,148/-. Therefore, irrespective of the nature of the grievance of the complainant, it is not open for the complainant to file a complaint based on the said transactions on 19.06.2018. Not only the complainant failed to disclose any cause of action to indicate the maintainability of the complaint but same is also barred by law of limitation.

32. The respondent submitted that as far as the issue of refunding the money to the complainant is concerned, it is not in dispute in the complaint that the demand notice dated 16.07.2013, 31.07.2013 and 12.08.2013 were received by the complainant. Thus, if the complainant wishes to dispute the cancellation of



his allotment, same can be done only by following the due process of law and after recording the evidence and adjudicating upon the same by a competent court of law.

33. The respondent submitted that in the present complaint, nowhere the complainant mentions about his grievance about the cancellation of his allotment and it appears that as an afterthought, the complainant is filing the present complaint in order to avail interest on the money deposited by the complainant way back in 2013.
34. The respondent submitted that the complainant booked the shop with Imperia Wishfield Private Limited on 28.10.2014. But the present complaint is not maintainable in the present form since Imperia Wishfield Private Limited was not made a party to the present complaint. However, the present complaint is filed only against M/s Imperia Structures Ltd. which is a different juristic entity in the eyes of law.
35. The respondent submitted that as far as the issue as mentioned in page 15 of the complaint regarding the alleged assurance is concerned, there is no document attached along with the complaint to indicate that time is an essence of the contract in the present case.



36. The respondent submitted that question of breaching the agreement by not delivering possession of the apartment to the complainant is a mixed question of law and fact. In the present case, the complainant's allotment was cancelled since the complainant violated the terms and conditions of the application form and in particular clause no. 6. There is no pleading in the complaint of the complainant that the complainant complied with clause no. 6 and there is no denial of the fact that till date the document at page 29 dated 04.10.2013 has not been challenged by the complainant before any competent authority of law.
37. The respondent submitted that it is also pertinent to note that from Page 24 of the complaint it is apparent that the complainant's cheques were not honored as from the annexure C-3 it can be seen that in sr. no. 2 and 4 two cheques for booking amount and first instalment of an amount of Rs.4,30,000/- and Rs.5,00,000/- issued on 06.02.2012 and 17.04.2012 were dishonored on 07.02.2012 and 09.05.2012 respectively. Thus, it is in dispute whether the complainant was actually able to honor the financial commitments made by respondent.
38. The respondent submitted that in view of the above factual scenario, it is humbly submitted that the present complaint



was not maintainable since the present complaint involves disputed mix questions of facts and law. Further, it is not clear from the complaint as to what prevented the complainant to move a civil court of competent jurisdiction from determining the issue at hand and seek adequate compensation in terms of money as sought in the present complaint.

39. The respondent submitted that it is further submitted that the present complaint was filed in contravention of the Haryana Real Estate Regulatory Authority, Panchkula (adjudication of complaints) Regulations, 2018 since on a perusal of the present complaint, no case is made out under regulation 14 and thus the present complaint is liable to be dismissed on that ground alone.
40. The respondent submitted that the present complaint is also in contravention of regulation 18 since even though the complainant has contended that a shop was booked by the complainant with receipt annexed as annexure C-9 with a vague and baseless contention at para 12 that the respondent was assured of adjustment of amount. However, there is no documentary evidence produced in this regard which was produced by the complainant before this Id. authority.



41. The respondent submitted that the documents provided to the answering respondent are not legible copies. The answering respondent specifically states that pages 24, 29 and 32 are not legible copies. Thus, the copies were not in compliance of the regulation 20.
42. The respondent submitted that in view of the same, the respondent request that the present complaint may be dismissed as the same is not in compliance with a provision of the Real Estate Regulation and Development Act, 2016 read with Haryana Real Estate Regulation and Development Rules, 2017. Further, if the complainant is left with any grievance which can be determined only after taking into account the evidence in record, the complainant is entitled to take such recourse as available under the law.
43. The respondent submitted that since this Id. authority neither governed by the procedure as laid down under the procedure of the Code of Civil Procedure, 1908 (hereinafter "CPC") nor Indian Evidence Act. It is apparent from perusal of the Rule 28 under which the present notice was issued to the answering respondent that this Id. authority shall follow a summary procedure and not bound by procedure of the CPC and Indian Evidence Act.



44. The respondent submitted that however, if this Id. authority is of the view that the question of disputed facts is required to be adjudicated, it is humbly submitted that this Id. authority may be pleased to exercise the powers under section 35(2) of the Act.

Findings of the authority

45. The authority has complete subject matter jurisdiction to decide the complaint regarding 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.



Decision and direction of the authority

46. Keeping in view the facts and circumstances of the complaint, the authority is of the view that complainant booked an

apartment no. H403, Tower-H, “The Esfera” Sector 37-C Gurugram with the respondent but no builder buyer agreement was executed inter-se the parties. Till date the respondent has failed to deliver the booked unit to the complainant. However, there were certain defaults on the part of the buyer as he failed to deposit certain construction linked instalments. Complainant has deposited only Rs.18,52,052/-+ Rs.2 lakhs. However, builder being in a dominating position took a unilaterally decision and cancelled the allotment of the complainant and refunded an amount of Rs.11, 08,148/- after forfeiting balance amount of Rs. 8,00,000/- . However, the complainant has brought on record that it was a pre-launch project. The building sanction plan has been received by the builder on 18.12.2012. The project is complete and delivered to various allottees. However, it has come on record that the complainant did not get his cheque encashed. Keeping in view the facts and circumstances on record , complainant is entitled to get his cheque encashed issued to him. It may not tantamount to m arrowing his refund amount. Builder is liable to refund the amount in lieu of cheque issued earlier within 90 days.



The authority is exercising its power under section 37 of the Real Estate (Regulation and Development) Act, 2016 issues the following directions

- a) The respondent is directed to refund the paid amount of Rs. 11,08,148/- in lieu of cheque issued dated 04.10.2013 earlier within 90 days.
- b) In addition to this respondent is also directed to refund the amount of Rs. 2,00,000/- which was accepted by them at later stage. Any more money charged by the builder by way of defrauding the complainant shall also be refunded.

47. Complaint is disposed of.

48. File be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 04.12.2018

Judgement Uploaded on 08.01.2019

