

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 04.12.2018
Complaint No.	302/2018 case titled as Mr. Janak Raj Johar Vs. M/s Golden Peacock Residence Pvt. Ltd. & anr.
Complainant	Mr. Janak Raj Johar
Represented through	Shri Venkat Rao, Advocate for the complainant.
Respondent	M/s Golden Peacock Residence Pvt. Ltd. & anr
Respondent Represented through	None 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.

Today the case was fixed for arguments but none has appeared on behalf of the respondent. Since nobody has appeared on behalf of the respondent despite complete service of summons/notice, respondent be proceeded ex-parte.

Arguments heard.

There is ample evidence on record where complainant has asked for refund on account of non-performance of the respondent-company in fulfilling its obligation with regard to completion of unit and handing over the

possession to the complainant. In the allotment letter, unit No.904, 9th floor, in project “Michael Schumacher World Tower”, Sector-109, Gurugram was to be handed over to the complainant within a period of 36 months plus 6 months grace period from the date of signing of allotment letter dated 14.1.2013, which comes out to be **14.7.2016**. Since the BBA has not been executed inter-se the parties, as such, there is no choice left with the authority but to order the refund of the total amount deposited by the complainant/buyer alongwith prescribed rate of interest i.e. 10.75% per annum within a period of 90 days from this order.

Accordingly, it is directed that the respondent to refund the entire amount paid by the complainant alongwith prescribed rate of interest i.e. 10.75% per annum within a period of 90 days from the date of this order.

Complaint is disposed of. 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. : 302 of 2018
First date of hearing: 18.07.2018
Date of decision : 04.12.2018

Mr. Janak Raj Johar,
R/o. H.No. 31, Atam Nagar,
Ludhiana-141003, Panjab.

Complainant

Versus

1. M/s Golden Peacock Residencies Pvt. Ltd.
2. M/s Homestead Infrastructure
Development Pvt. Ltd.

Respondents

Both addressed at: Unit no. 502,
Building D- Mall Netaji Subhash Palace,
Pitampura, New Delhi-110034.

CORAM:

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

Chairman
Member
Member

APPEARANCE:

Shri Venkat Rao Advocate for the complainant
None for the respondent Proceeded ex-parte

ORDER

1. A complaint dated 22.05.2018 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. Janak Raj Johar, against the promoters M/s Golden Peacock Residencies



Pvt. Ltd. and M/s Homestead Infrastructure Development Pvt. Ltd. by not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the allotment letter was signed on 14.01.2013 i.e. prior to the commencement of the Act *ibid*, 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	“Michael Schumacher World Tower”, Sector 109, Gurugram, Haryana.
2.	RERA registered/not registered	Not registered
3.	Unit/flat no.	904, 9 th floor
4.	Unit measuring	3940 sq. ft.
5.	Date of booking	11.09.2012
6.	Booking amount paid	Rs.30,00,000/- acknowledged by the respondent vide receipt dated 11.09.2012
7.	Allotment letter	14.01.2013
8.	Payment plan	Construction linked payment plan



9.	Flat buyer's agreement	Not executed
10.	Total basic selling price as per application form	Rs.4,13,70,000/-
11.	Total amount paid by the complainant till date	Rs.1,41,75,000/-
12.	Date of delivery of possession 36 months from the date of allotment letter + 6 months of grace period.	14.07.2016.
13.	Delay in handing over possession till date of decision	2 years 4 months and 20 days

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The case came up for hearing on 18.07.2018, 04.09.2018 and 04.12.2018. Despite service of notice, neither the respondent has appeared nor has filed their reply to the complaint, therefore their right to file reply has been struck off and case is being proceeded ex-parte against the respondent. The reply filed on behalf of the respondent on 11.09.2018 has been perused.

Brief facts of the complaint

5. The complainant submitted that in August 2012, the real estate project "Michael Schumacher World Tower" at Sector 109, Gurugram, Haryana came to the knowledge of the complainant through web page campaign of the respondents. Upon enquiry by the complainant, representative of the



respondents informed the complainant the one Mr. Karan Oberoi is the sole authorised sales partner and advised the complainant to contact him for further course.

6. The complainant submitted that on 11.09.2012, the respondents through their channel partner, Mr. Karan Oberoi, representing themselves to be builders and developers of repute, approached the complainant and invited him to purchase an apartment in the said project. The complainant relying on the representations, assurances, brochures and meetings, agreed to purchase one flat admeasuring 2750 sq. ft. @10,500/- per sq. ft. amounting to a total sale consideration of Rs.2,88,75,000/- excluding service tax under construction linked payment plan. The duly filled and signed application form along with a cheque of Rs.30,00,000/- dated 05.09.2012 was handed over and the same was duly acknowledged by receipt dated 11.09.2012 by the respondent no.1.

7. The complainant submitted that respondent no.1 vide letter dated 27.02.2013 demanded two passport size photographs, PAN card copy, proof of address and signature verification etc. The respondent no.1 also stated in the letter that they will dispatch two copy of the apartment buyers agreement for the signature.



8. The complainant submitted that on seeing the application form and the apartment buyers agreement realised that the respondent no.1 arbitrarily with mala fide and mischievous intention have changed the size from agreed size of 2750 sq. ft. to 3940 sq. ft. and also changed the consideration payable. It is also submitted that at the time of booking, the complainant had duly filled and signed the application. The complainant had duly deposited the booking amount as per the agreed terms and conditions of application form at the time of booking on 11.09.2012. The complainant objected to the above illegal and arbitrary actions of the respondents and requested them to rectify the allotment and waive interest once again.
9. The complainant submitted that it also came to the knowledge of the complainant that Mr. Karan Oberoi is a real estate broker running his own company in the name of M/s United Estate at Sohna Road, Gurugram, Haryana.
10. The complainant submitted that he gave two letters to the respondent no.1 for waiver of interest and another for rectification of allotment of unit. The respondents asked the complainant to submit all the documents and receipts in good faith so as to issue a fresh one after rectifying the wrong allotment. The respondents again insisted on payment and made the calculation of the dues based on unit size of 2750 sq.



ft. and assured the complainant that they will send everything along with assured buy back guarantee agreement within a month's time. The complainant had deposited the requisite documents and from time to time made an aggregate payment of Rs.1,41,75,000/-.

11. The complainant submitted that instead of rectifying the allotment, the respondent no.1 vide letter dated 15.11.2014 informed the complainant that the apartment no. 904 at 9th floor admeasuring 3940 sq. ft. has been allotted to the complainant in the project and raised an illegal and unauthorised demand of Rs.1,01,20,662/- to be paid by 30.11.2014 and threatened to cancel the allotment and forfeit the earnest money, impose penalties etc.
12. The complainant submitted that he again visited the respondents office at Gurugram along with Mr. Karan Oberoi as almost 15 months has been gone by as per the commitment of the respondents for rectification of allotment to access the development and to seek withdrawal of letter dated 15.11.2014. Upon seeking to understand the status of the project and rectification of allotment, the officers of respondent no. 2 compelled the complainant to sign a fresh application form of higher unit area and threatened to forfeit the entire amount in case of non-signing of application form



etc. The officers of respondent no. 2 snatched and torn the xerox copies of letter and receipts, which the complainant was carrying at that time. It is pertinent to note that as had been promised at the time of booking, the unit was to be delivered by December 2015, however, till such date of referred visit the progress at the project was very slow.

13. The complainant submitted that to the utter dismay and frustration of the complainants, the respondents replied to the letter of the complainant dated 20.08.2015, refused to consider any of the alternatives and illegally, unauthorizedly and arbitrarily threatened to forfeit the amounts paid by the complainant. Thereafter, Mr. Atul Ahlawat, advocate of the respondents sent the cancellation notice of unit, on 25.11.2015 stating that as per terms of booking /allotment, upon cancellation a sum equivalent to the earnest money shall be forfeited along with payable interest, brokerage and other dues and balance amount over and above the forfeited amount will be refunded to the complainant by the respondents. But till date neither the refund nor any allotment of apartment of 2750 sq. ft. has been made. The respondents are utilising the hard earned money of the complainant.



Issues to be decided

14. The issues raised by the complainant are as follows:

- i. Whether the respondents have cancelled the allotment of the unit unilaterally without sufficient cause in violation of section 11(5) of the Act ibid and have acted arbitrarily without sufficient justification in violation of their obligations under section 11 of the Act?**
- ii. Whether the respondent have failed to offer possession and/or failed under section 18 of the Act?**
- iii. Whether the respondents are required to register the phase/ project in terms of section 3 of the Act ibid?**

15. Relief sought

In the present complaint the complainant is seeking the following relief:

- i. The respondent be directed to stay the cancellation of the unit and/or creation of any third party rights on the unit.**
- ii. The respondent be directed to refund the entire amount paid by the complainant along with interest**



@ 18% compounded on the entire money till the date of actual refund by the respondent.

iii. To impose such penalties on the respondents as deemed appropriate under section 59, 60 and 61 of the Act.

Reply on behalf of the respondent no.1 and 2:

16. The respondents submitted that the present case arises out of the booking of an apartment by the complainant in the said project and subsequent allotment was done in his favour vide application form after going through the contents of the same. Further, the complainant has made part payments towards the sale price in instalments on achievement of the particular stages of the construction as he opted for construction linked payment plan. The complainant is bound by the terms and conditions of the allotment and flat buyer's agreement already sent to the complainant way back for signing and execution on 27.02.2013 but for the best reasons known to the complainant the same has not been submitted by the complainant as such the present complaint is pre-mature and no cause of action arises in favour of complainant.
17. The respondent submitted that at the time of booking of the apartment, the complainant had paid Rs.30,00,000/- as



payment of the booking amount, after having fully satisfying himself about all the terms and conditions mentioned in the booking application for the provisional allotment of the apartment in the said project. It is pertinent to mention here that as per clause 11 of the booking application, “the measurements, dimensions, location and number of the apartment along with all the terms and conditions attached with the allotted apartment are tentative and subject to change”.

18. The respondent submitted that vide its letter dated 14.01.2013, apartment no. 904 measuring 3940 sq. ft. (tentative) in the project to the complainant. The respondent submitted that in response to demand letter dated 06.02.2013 followed by reminder letters, the complainant has approached the respondent no.1 vide letter dated 22.05.2013 for waiving off the interest amount and as a goodwill gesture, the respondent no.1 has approved the waiver on the interest. Also, the said letter clearly depicts the acceptance of allotment of apartment no.904 admeasuring 3940 sq. ft. by the complainant which is further corroborated when the complainant has paid the outstanding instalment amount due as per demand letter dated 06.02.2013.



19. The respondent submitted that as regards to the contentions of the complainant on point that he filled up the application form for booking of apartment tentatively measuring 2750 sq. ft. and he was asked to pay a sum of Rs.1.2 crores within a year and the respondent no.1 will sell the unit at premium and he need not pay the rest amount and if needed the balance payment shall have to be made at the time of possession are patently false, frivolous and same vehemently denied. It is submitted that complainant has approached the respondent no.1 for booking and allotment of apartment through his agent namely one Mr. Karan Oberoi and from the facts reflected above, it is clear that there was no possibility that complainant was misinformed and misguided about area and pricing of the apartment in question.
20. The respondent submitted that on 29.05.2015, the company has already communicated to the complainant that it will accede to the complainant's request for a smaller size apartment subject to his timely payment of all dues and withdraw his unfounded allegations against the respondent no.1. The company further asked the complainant to come in person to discuss and sort out all issues to the benefit of both the parties.



21. The respondent submitted that as per terms and conditions of application form, the payment of consideration and other charges as per payment plan is essence of allotment, failing which the provisions of interest, cancellation and forfeiture of earnest money shall follow and from the conduct of the complainant it is apparent that for the best reasons known to him, he has himself violated the terms and conditions of application form and allotment as the timely payment of instalments is essence of transactions, failing which would constitute breach of understanding on his part and respondent no.1. within its legal rights would be entitled to cancel the allotment of apartment and forfeit the earnest money. In the present matter, complainant failed to pay the instalment due (i) on the stage of casting ground floor (ii) casting of third floor slab (iii) casting of seventh floor slab which was due since demand letters dated 20.05.2014, 30.10.2014 and 20.02.2015 respectively despite giving several opportunities.

22. The respondent submitted that the construction work went up to 8th floor, while the payment is made by the complainant up to excavation work stage only. Total principal payment up to 7th floor amounting to Rs.1,46,60,073/- as per the payment schedule, which the complainant had wilfully defaulted. Owing to the wilful default in the timely payment of instalment dues,



the company always cooperated with the complainant and waived off interest to the tune of Rs.4,16,140/- on his initial request.

23. The respondent submitted that the contract for construction of the said project was awarded to M/s Shapoorji Pallonji Co. and the construction work went on smoothly as per scheduled timeframe work up to 8th floor. However, M/s Shapoorji Pallonji Co. committed breach of agreement and abruptly stop the construction work in the month of February 2015 without notice. On the initiative of the respondent, several round meetings took place with high level representatives of the parties but the entire exercise proved to be futile. M/s Shapoorji Pallonji Co. involved the respondent in various litigations by way of approaching Civil Court, Gurugram and filed two petitions under section 9 of Arbitration and Conciliation Act, 1996 and obtained ex-parte injunction against the respondent no.1. The respondent no.1 placed true and correct facts before the hon'ble court and accordingly the injunction order was vacated and ultimately the petition was dismissed on 23.05.2016. The dispute could not be settled amicably between the parties inspite of best sincere efforts made by the respondent no.1. this shows that M/s Shapoorji Pallonji Co. had stopped construction work in February 2015



without any reason and thereafter started series of litigation against the respondents thereby causing delay in the construction work of the project, which is beyond the respondent's control.

24. The respondent submitted that accordingly an arbitration clause was invoked and petition under section 11 of the Arbitration and Conciliation Act was filed by Shapoorji Pallonji Co. before the Hon'ble Punjab and Haryana High Court at Chandigarh vide Arbitration Case no. 111/2016 wherein the Hon'ble High Court referred the dispute to the Arbitral Tribunal Comprising of Justice Rajive Bhalla (Retd.), Justice Anil Kumar (Retd.). the said matter is listed for final arguments on 14th and 15th of September 2018 before the Hon'ble Tribunal.

25. The respondent submitted that the complainant also filed a criminal complaint against the respondents on the same facts before the EOW, Gurugram. The respondents cooperated with the investigation and after investigation, it was found out that no criminal offence is found to have been made out against the company and the said complaint was subsequently closed.

26. The respondent denied that the complainant booked a flat admeasuring 2750 sq. ft. @ Rs.10,500/-. It is pertinent to point



out that the complainant has signed the booking application form wherein it is clearly mentioned that the tentative size of the unit was 3750 sq. ft. Furthermore, the respondent no.1 vide its letter dated 14.01.2013 has allotted an apartment no.904 admeasuring 3940 sq. ft. (tentative) in the project to the complainant. The factum of receiving Rs.30 lakhs as the booking amount is admitted.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise finding of the authority is as under:

27. With respect to the **first issue** raised by the complainant, the complainant has sent letter dated 28.01.2015, 3.4.2015, 15.7.2015 and 20.7.2015 is available on record wherein he sought refund of amount paid by him i.e. Rs.1,41,75,000/- along with interest @24% p.a. from the date of deposit of particular payment. Thereafter, on 25.11.2015 the respondent has sent a cancellation notice stating that complainant can discuss the matter regarding outstanding payment with the warning that the complainant will have no right, title and interest in the said unit. However, the respondent has not issued any formal cancellation letter to the complainant and



also did not refunded any penny amount as per terms of application form which is unreasonable in the eyes of law. Therefore, there is no choice left with the authority but to refund the total amount deposited by the complainant along with prescribed rate of interest i.e. 10.75% per annum.

28. With respect to the **second issue** raised by the complainant, since neither the application form does not contain any clause regarding the due date of handing over possession nor the flat buyer agreement has been executed, therefore in the interest of justice the authority is of the view, the time period of handing over possession shall be computed from the date of allotment letter i.e. 14.01.2013. Hence, the possession was to be handed over within a period of 36 months plus 6 months grace period from the date of signing of allotment letter which comes out to be 14.07.2016. Therefore, the possession has been delayed by two years four months and twenty days from due date of possession till the date of possession.



29. With respect to the **third issue** raised by the complainant, the said project is not saved under section 3(2)(b) of the Act ibid and is covered under the definition of “on-going projects” as defined under rule 2(o) of the Rules ibid which provides as under:

“on going project” means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:

(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules and

(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules.”

Keeping in view the above facts and as per the records of the authority, the project is registerable under section 3 of the Act ibid and the respondents have not registered the project with the Haryana Real Estate Regulatory Authority as on date. This omission on their part is violation of proviso to section 3(1) of the Act ibid which provides as under:

“Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:”



Consequently, the above act on the behalf of the respondents is a punishable offence under section 59(1) of the Act *ibid.* section 59(1) provides as under:

“If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten per cent. of the estimated cost of the real estate project as determined by the Authority.”

Findings of the authority

30. 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, 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.

31. 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 the respondent in the interest of justice and fair play is directed to refund the entire paid amount of Rs.1,41,75,000/- along with prescribed rate of interest @10.75% p.a. from the date of each payment till 04.12.2018 (date of disposal of complaint) to the complainant within a period of 90 days. Interest component in a tabular form is given below:

Date of payment	Principal amount paid	Interest payable on paid amount @ 10.75% p.a. from date of payment till 04.12.2018
11.09.2012	Rs.30,00,000/-	Rs.20,10,102/-
12.12.2012	Rs.48,75,000/-	Rs.31,34,324/-
25.05.2013	Rs.15,00,000/-	Rs.8,91,955/-
05.06.2013	Rs.30,00,000/-	Rs.17,74,191/-
17.06.2013	Rs.18,00,000/-	Rs.10,56,563/-

Principal amount	Rs.1,41,75,000/-
Interest accrued	Rs.88,67,135/-
Total amount to be refunded to the complainant by the respondent.	Rs.2,30,42,135/-



32. The order is pronounced.

33. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.12.2018

(Subhash Chander Kush)

Member

Judgement Uploaded on 09.01.2019



HARERA
GURUGRAM

