

PROCEEDINGS OF THE DAY

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| Day and Date | Tuesday and 04.12.2018 |
| Complaint No. | 294/2018 case titled as Mr. Prabhu Dayal Kapoor Vs. M/s Adel Landmarks Ltd. |
| Complainant | Mr. Prabhu Dayal Kapoor |
| Represented through | Complainant in person with Shri Sushil Yadav, Advocate |
| Respondent | M/s Adel Landmarks Ltd. |
| Respondent Represented through | Ms. Akshita Singh, on behalf of respondent-company. |
| Last date of hearing | 26.9.2018 |
| Proceeding Recorded by | Naresh Kumari & S.L.Chanana |

Proceedings

Project is not registered with the authority.

Arguments heard.

As per clause 10.1 of the Builder Buyer Agreement executed inter-se the parties on 8.12.2012 for unit/flat No.CSM/103/C-0503, Tower-C, 5th floor, Cosmocity-I, Sector-103 Gurugram, the possession of the said unit booked by the complainant was to be delivered within a period of 36 months from the date of signing of the agreement plus 6 months grace period which comes out to be 8.6.2016. Complainant/buyer has already paid an amount of Rs.31.03,847/- to the respondent.

Counsel for the complainant has alleged that work at the project is stand still since October, 2014 and it is nowhere near completion. Project is

not registered and the respondent/builder is not in possession of a valid licence. As such, proceedings under section 59 of the Real Estate (Regulation & Development) Act, 2016 for imposing penalty for violation of section 3 (1) of the Act be initiated against the respondent. Since the project is not either under construction nor there are any chances of its being taking off, as such, the complainant/buyer is not likely to get possession of the flat in near future. As such, as per section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, complainant is entitled to get the entire amount paid by him to the respondent.

Accordingly, the respondent is directed 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 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. : 294 of 2018
First date of hearing: 02.08.2018
Date of decision : 04.12.2018

Mr. Parbhu Dayal Kapoor
H. NO. 207 gali no. 3, Madanpuri,
Gurugram-122001

Complainant

Versus

M/s Adel Landmarks Ltd
Head office: Gautam Buddha Nagar,
C-56/14, Sector-62, Noida-201303

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shree Parbhu Dayal Kapoor Complainant in person
Shree Sushil Yadav Advocate for the complainant
Shri Mohd. Amir Authorized representative on
behalf of the respondent
Ms Tarini Bhargava Advocate for the respondent

ORDER

1. A complaint dated 18.05.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act herein after referred to HARERA, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the



complainant Mr. Parbhu Dayal Kapoor, against the promoter M/s Adel Landmarks Ltd., in respect of apartment number CSM/103/C-0503, tower C on 5th floor in the project 'Cosmocity', on account of violation of the section 3 and section 11(4)(a) of the RERA Act, 2016 ibid.

2. Since, the buyer's agreement has been executed on 08.12.2012 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 case are as under: -

- **Nature of the project- Residential project.**
- **DTCP license no.- 79 of 2010 dated 16.10.2019**
- **License valid/renewed upto- 15.10.2014**
- **License holder- M/s Headway Buildcon Pvt. Ltd.**



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| 1. | Name and location of the project | "Cosmocity", Sector 103, Gurgaon. |
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|-----|---|--|
| 2. | Nature of the project | Residential colony |
| 3. | RERA registered/ not registered. | Not registered |
| 4. | Apartment/unit no. | CSM/103/C-0503, tower C on 5 th floor |
| 5. | Apartment measuring | 1368 sq. ft |
| 6. | Payment plan | Construction linked plan |
| 7. | Date of execution of buyer's agreement | 08.12.2012 |
| 8. | Total consideration | Rs.45,04,240/- As per statement of accounts |
| 9. | Basic sale price | Rs. 34,14,528/- |
| 10. | Total amount paid by the Complainant | Rs. 31,03,847/- As per statement of accounts |
| 11. | Date of delivery of possession as per clause 10.1 of the buyer's agreement (36 months + 6 months grace period from the date of execution of buyer's agreement) | 08.06.2016 |
| 12. | Delay in handing over possession till date | 2 years 5 months 26 days |
| 13. | As per penalty clause 10.2 of apartment buyer's agreement dated 08.12.2012 | Rs.75/- sq. mt per month of the super area of the said flat. |



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 respondents. An apartment buyer's agreement is available on record for the aforesaid apartment according to which the possession of the same was to be

delivered by 08.06.2016. Neither the respondents have delivered the possession of the said unit as on date to the purchaser nor have they have paid any compensation @ Rs.75/- sq. ft per month of the super area of the said flat for the period of such delay. 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 appearance. The respondent through his counsel appeared on 04.09.2018. The case came up for hearing on 18.07.2018, 04.09.2018 and 26.09.2018. The reply filed on behalf of the respondent has been perused.

Facts of the case

6. The complainant submitted that the respondent gave advertisement in various leading newspapers about their forthcoming project named Cosmocity, Sector 103, Gurugram promising various advantages, like world class amenities and timely completion/execution of the project etc. Mr. Subhash Chandra, booked an apartment/flat admeasuring 1368 sq. ft. in aforesaid project of the respondent for basic sale price of



Rs.3414528/- and total sale consideration is Rs.4361968/- which includes BSP, car parking, IFMS, Club Membership, PLC etc. The complainant made payment of Rs.3103847/- to the respondent vide different cheques on different dates

7. The complainant submitted that as per flat buyer's agreement the respondent had allotted a unit/flat bearing No 0503 on 5th floor in block-C having super area of 1368 sq. ft. to the complainant. That as per para No.10.1 of the flat buyer agreement, the respondent had agreed to deliver the possession of the flat within 36 months from the date of signing of the flat buyers agreement dated 08.12.12 with an extended period of six months.
8. The complainant submitted that it could be seen that the construction of the block in which the complainant flat was booked with a promise by the respondent to deliver the flat by 08.06.2016 but was not completed within time for the reasons best known to the respondent which clearly shows that ulterior motive of the respondent was to extract money from the innocent people fraudulently.



9. The complainant submitted that as per clause 10.1 of the flat buyer agreement dated 08.12.2012 it was agreed by the respondent that in case of any delay, the respondent shall pay to the complainant a compensation @ Rs.75/- per sq.mt. per month of the super area of the apartment/flat. It is however, pertinent to mention here that a clause of compensation at a such of nominal rate of @ Rs.75/- per sq.mt. per month for the period of delay is unjust and the respondent has exploited the complainant by not providing the possession of the flat even after a delay of almost 23 months from the agreed possession plan. The respondent cannot escape the liability merely by mentioning a compensation clause in the agreement. It could be seen here that the respondent has incorporated the clause in one sided buyer's agreement and offered to pay a sum of @ Rs.75/- per sq. mt. for every month of delay. If we calculate the amount in terms of financial charges it comes to approximately @ 2% per annum rate of interest whereas the respondent charges 18% per annum interest on delayed payment.



10. The complainant submitted that the complainant has requested the respondent several times on making telephonic calls and also personally visiting the office of the respondent either to deliver possession of the flat in question or to refund the amount along with interest @ 18% per annum on the amount deposited by the complainant but respondent has flatly refused to do so. Thus, the respondent in a pre-planned manner defrauded the complainants with his hard earned huge amount and wrongfully gain himself and caused wrongful loss to the complainant.
11. The complainant submitted numerous visits to the Noida office and telephonic enquiries yielded only false assurances, that construction work will commence shortly but that never fructified.

Issues raised by the complainant

12. **The following issue have been raised by the complainant:**
- Whether the respondent /firm is not completing the construction and It could be seen here that the respondent has incorporated the clause is one sided buyer agreement which is unjustified?**



- ii. **Whether the flat has not been handed over to the petitioner till today and there is no reasonable justification for the delay?**
- iii. **Whether the interest cost being demanded by the respondent/developer is very higher i.e.18% which is unjustified and not reasonable?**

Relief sought:

In view of the above, complainant seeks the following relief:

- (i) **Direct the respondent to refund the amount of Rs. 3103847 /- along with interest @ 18% per annum on compounded rate from the date of booking of the flat in question;**
- (ii) **Direct the respondent to pay interest calculated @18% per annum on compound rate from the committed date of possession i.e 08.06.2016 on the entire sum paid by the complainant to the respondent and to continue paying such interest till the possession is handed over by the respondent to the complainant.**



(iii) Direct the respondent to handover the possession of the respective flat to the complainants.

(iv) Direct to pay a sum of Rs.30000/- (Rs. Thirty thousand only) cost of litigation.

(v) Direct to pay a cost of Rs500000/- (Rs Five lacs only) for the harassment and mental agony suffered by the complainant.

Reply by the respondent सत्यमेव जयते

13. The respondent submitted that at the very outset, it is most respectfully submitted that the complaint filed by the complainant is not maintainable and this learned regulatory authority has no jurisdiction whatsoever to entertain the present complaint. The respondents have also separately filed an application for rejection of the complaint on the ground of jurisdiction and this reply is without prejudice to the rights and contentions of the respondent contained in the said application.



14. The respondent submitted that the parties entered into legally binding agreement. The parties are bound to follow the terms and conditions of the agreement and in case of delay in possession necessary provisions for payment of compensation to allottee have been incorporated therein. Therefore, any relief beyond the terms and conditions of the agreement is unjustified.
15. The respondent submitted that no cause of action has ever accrued in favor of the complainant to file the present complaint before this learned regulatory authority. The complaint being without any cause of action is liable to be dismissed at this ground alone.
16. The respondent submitted that respondent company has developed various projects and has completed those projects. The respondent has obtained occupancy certificate in majority of its projects. Since, the respondent has been diligent in completing all its project and shall be completing the remaining projects in phased manner therefore it is humbly



submitted that the COSMOCITY-I project shall be completed at the earliest.

17. The respondent submitted that the complainant has nowhere established that the 'Project' is an on-going project that ought to register before this learned authority. The regulatory authority was pleased to issue a show cause regarding the non-registration of project 'Cosmocity-I' and the respondent company after making appearance was granted time to file a response to the said show cause notice by the learned authority herein. The authority having not yet given a finding on the said issue of registration, cannot be misguided by the complainant herein who has approached this hon'ble regulatory authority presuming that the respondent company is liable to be registered. The matter once being *sub-judice* before this and the liable to be stayed and/or dismissed on this ground alone.



18. The respondent submitted that, without prejudice to the above, clause 19.1 of the agreement clearly stipulates that in the eventuality of any dispute with respect to the 'project', the

aggrieved party ought to invoke arbitration. The respondent has also separately filed an application for rejection of the complaint on the ground that the matter is within the scope of arbitration alone and cannot be agitated in the present forum. The present reply is being filed without prejudice to the rights and contentions of the respondent contained in the said application.

19. The respondent submitted that, without prejudice to the above, despite several adversities, the respondent's company has continued with the development of the said project and is in the process of completing the legal formalities as well as compliances, However, as the complainant is only a supersizing power of the learned authority and not interested in taking over the possession of the said plot, therefore the complaint is liable to be rejected. The alleged grievance of the complainant has origin and motive in sluggish real estate market.

20. The respondent submitted that the complaints pertaining to compensation and interest for a grievance under section 12,



14, 18 and 19 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the “said Act”) are required to be filed before the adjudicating officer under rule-29 of the Haryana Real Estate (Regulation And Development) rules, 2017 (hereinafter referred to as the “said Rules”) read with Section 31 and Section 71 of the said Act and not before this learned regulatory authority under rule-28. Section 31.

21. The respondent submitted that the name of the respondent was changed from Era Landmarks Limited to Adel Landmarks projects Limited vide fresh certificate in incorporation upon change in name dated 14.12.2013 issued by Registration of Companies for Delhi and Haryana (“ROC”) and then to Adel Landmarks Limited vide fresh certificate in incorporation upon change in name dated 19.2.2014 issued by ROC.

22. The respondent submitted that vide a resolution passed by the board of directors of the respondent company Mr. Mohd. Amir, has been authorized and empowered to sign and verify the pleadings, and to move appropriate reply, in the name of and



on behalf of the respondent company. It is further authorized to him to lead the evidence and to proceed further in the case.

23. The respondent submitted that the DTCP Haryana granted license no.79 of 2010 in favor of M/s Headway Buildcon Pvt. Ltd. for development of residential group housing colony over land admeasuring 10.437 acres of land situated in village Dhanwapur, Sector- 103, tehsil and district Gurugram which is privately named "COSMOCITY" i.e. subject project and building plans (sanction letter bearing memo no. ZP-665/AD/RA/2014/4379 dated 03.03.2014) with respect to the subject project was approved by DTCP. Moreover, the respondent company has already filed Form LC - VI for renewal of the license no. 79 of 2010 dated 06.07.2017.

24. The respondent submitted that the respondent company is in process to get the project registered under Real Estate Regulation Act, 2016. It is pertinent to mention that this learned authority vide complaint no. HARERA/ GGM/ 2018/ suo-motu/ NON-REG/ 09 dated 31.08.2018 (received by the respondent company on 08.09.2018) has already issued show-



cause notice consequent upon non-registration of on-going project and the same is under due deliberation and pending adjudication by this learned regulatory authority. Thus, the subject on which this complaint has been instituted is materially and substantially already being deliberated upon by this learned regulatory authority and hence, the present complaint is liable to be stayed and/or dismissed.

25. The respondent submitted that respondent company is in the process of developing *inter alia*, various residential and commercial projects to the satisfaction of its customers. The respondent company is doing its level best to implement the projects undertaken by the respondent company in time and to deliver good quality apartments/ units and to provide excellent services to its clients/ customers.

26. The respondent submitted that the each and every averment of the complaint is wrong, false and vehemently denied unless particularly admitted in the succeeding paragraphs

Application under Section 8 of The Arbitration And Conciliation Act, 2015 and its reply:-



The respondent filed an application submitting that the complainant in the complaint are relying upon the builder buyer agreement existing between the parties and clause 19(2) of the agreement is a validly existing arbitration agreement between the parties. In context of clause 19(2) of the buyers agreement as well as sub-section 1 of Section 8 of the Arbitration and Conciliation Act, 2015 the present dispute is liable to be referred to arbitration since it is a mandate of Section 8 that any dispute brought before any judicial authority under any action which is the subject matter of arbitration "shall" be referred to arbitration between the parties.

Determination of issues

27. After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:
28. With respect to **first and third issues** raised by complainant, 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.”

29. With respect to **second issue** raised by complainant, the authority came across that as per clause 10.1 of apartment buyer’s agreement, date of delivery of possession was (36 months from the date of execution of this agreement + 6months grace period). Therefore, the due date of handing over possession will be computed from 08.12.2012. Accordingly, the due date of possession was 08.06.2016 and the possession has been delayed by two years five months and twenty-six days till the date of decision.

30. As the possession of the flat was to be delivered by 08.06.2016 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 Real Estate (Regulation And Development) Act, 2016.

31. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

34 (f) Function of Authority –

To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

Findings of the Authority

32. Jurisdiction of the authority-

i. Subject Matter Jurisdiction

The authority has complete 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 complainants at a later stage.

ii. Territorial Jurisdiction



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. No completion certificate/ occupation certificate or part thereof has been placed on record by the complainant. accordingly, the project falls within the definition of ongoing project and is consequently liable for non-registration.

33. The authority is of the considered opinion that it has been held in a 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.

34. Further, **in Aftab Singh and Ors. v. Emaar MGF Land Ltd and Ors., Consumer case no. 701 of 2015- NCDRC (affirmed by the Supreme Court incivil appeal no.(s). 23512-23513 of 2017)**, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

35. As per clause 10.1 of the builder buyer agreement executed inter- se the parties on 8.12.2012 for unit/flat no.CSM/103/C-0503, tower-C, 5th floor, Cosmocity-I, Sector-103 Gurugram, the possession of the said unit booked by the complainant was to be delivered within a period of 36 months from the date of signing of the agreement plus 6 months grace period which comes out to be 8.6.2016. Complainant/buyer has already paid an amount of Rs.31.03,847/- to the respondent.

36. Counsel for the complainant has alleged that work at the project is stand still since October,2014 and it is nowhere near completion. Project is not registered and the respondent/builder is not in possession of a valid licence. As



such, proceedings under section 59 of the Real Estate (Regulation And Development) Act, 2016 for imposing penalty for violation of section 3 (1) of the Act be initiated against the respondent. Since the project is not either under construction nor there are any chances of its being taking off, as such, the complainant/buyer is not likely to get possession of the flat in near future. As such, as per section 18 (1) of the Real Estate (Regulation And Development) Act, 2016, complainant is entitled to get the entire amount paid by him to the respondent.

Decision and directions of the authority

37. 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 issue the following direction to the respondent in the interest of justice and fair play:

- i. The respondent is directed to refund the entire amount paid by the complainant 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 |
|-----------------|---|--|
| 01.12.2010 | Rs.4,00,000/- | Rs. 3,44,353.41/- |
| 14.04.2011 | Rs.2,24,000/- | Rs. 1,83,926.12/- |
| 31.03.2012 | Rs. 1,56,000/- | Rs. 1,11,983.78 /- |
| 07.05.2012 | Rs.73,632/- + Rs.21,982= Rs.95,614/- | Rs. 67,570.61/- |
| 24.04.2014 | Rs.14,360/-+ Rs.4,85,640/-= Rs.5,00,000/- | Rs. 2,47,826.78/- |
| 29.04.2014 | Rs. 3,82,356/- + Rs.40,790/- + Rs.8,454/-= Rs.4,31,600/- | Rs. 2,13,288.50/- |
| 30.04.2014 | Rs. 68,400/- | Rs. 33,781.83/- |
| 15.05.2014 | Rs. 5,00,000/- | Rs. 2,44,672.94/- |
| 21.05.2014 | Rs. 2,99,000/- + Rs. 1,25,000/-= Rs. 4,24,000 | Rs. 2,06,733.41/- |



| | | |
|------------------|---|---------------------------|
| 07.06.2014 | Rs. 1,70,095/- + Rs.1,25,000/- + Rs. 9,138/-= Rs. 3,04,233/- | Rs. 1,46,866.56/- |
| Sub-total | Rs. 31,03,847/- | Rs. 18,28,003.94/- |

**Principal amount = Rs. 31,03,847/- + interest accrued =
Rs.18,28,003.94/- . Total = Rs. 49,31,850.94/-**

- ii. Since, the respondent has failed to get the project registered under section 3(1) of the Real Estate (Regulation and Development) Act, 2016, hence, penal proceedings under section 59 of the Act be initiated against them.

38. The order is pronounced.

39. Case file be consigned to the registry



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.12.2018

Judgement Uploaded on 08.01.2019