

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 10.01.2019
Complaint No.	531/2018 case titled as Mr. Sudha Yadav versus M/s Apex Buildwell Pvt. Ltd.
Complainant	Mr. Sudha Yadav
Represented through	Shri Sushil Yadav Advocate for the complainant.
Respondent	M/s Apex Buildwell Pvt. Ltd
Respondent Represented through	Shri Sandeep Chaudhary Advocate for the respondent.
Last date of hearing	4.10.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is not registered with the authority.

Since the project is not registered, as such notice under section 59 of the Real Estate (Regulation & Development) Act, 2016 for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

Arguments heard.

Complaint was filed on 11.7.2018. Notices w.r.t. reply to the complaint were issued to the respondent on 6.8.2018, 13.9.2018 and 17.10.2018. Besides this, a penalty of Rs.5,000/- and Rs.10,000/- was also imposed on 13.9.2018 and on 17.10.2018 for non-filing of reply even after service of notice.

A final notice dated 31.12.2018 by way of email was sent to both the parties to appear before the authority on 10.1.2019.

The brief facts of the matter are as under :-

As per clause 3 (a) of the Builder Buyer Agreement dated 16.3.2013 for unit No.1099-A, 10th floor, tower Iris in project "Our Homes" Sector-37C, Gurugram, possession was to be handed over to the complainant within a period of 36 months + 6 months grace from the date of execution of agreement which comes out to be **16.9.2016**. It was a construction/time linked payment plan. However, the respondent has not delivered the unit in time. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f. **16.9.2016** as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till the handing over possession failing which the complainant is entitled to refund the amount.

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 till handing over the possession shall be paid before 10th of subsequent month.

Complaint is disposed of accordingly. Detailed order will follow.

File be consigned to the registry.

Samir Kumar
(Member)
10.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 531 of 2018
First date of hearing: 13.09.2018
Date of decision : 10.01.2019

Mrs. Sudha Yadav
R/o 2394, Sector 46, Gurugram, Haryana.

Complainant

Versus

M/s Apex Buildwell Pvt. Ltd.
Regd. Office: 202 DLF City Centre, Mg Road,
Gurugram, Haryana.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sushil Yadav Advocate for the complainant
Shri Sandeep Chaudhary Advocate for the respondent

ORDER

1. A complaint dated 11.07.2018 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 Mrs. Sudha



Yadav against the promoter M/s Apex Buildwell Pvt. Ltd. on account of violation of the clause 3(a) of the apartment buyer's agreement executed on 16.03.2013 in respect of apartment number 1099A, 10th floor, block/tower 'Iris' in the project 'Our Homes' for not handing over possession on the due date i.e. 2nd June 2017 which is an obligation under section 11(4)(a) of the Act *ibid*.

2. The complaint was filed on 11.07.2018. Notices w. r. t. hearing of the case were issued to the respondent 06.08.2018, 13.09.2018 and 17.10.2018 for making his appearance. Besides this, a penalty of Rs. 5000/- and 10,000 was imposed on 13.09.2018 and on 17.10.2018 for non filing of reply even after service of notice. However despite due and proper service of notices, the respondent did not come before the authority despite giving him due opportunities as stated above. From the conduct of the respondent it appears that he does not want to pursue the matter before the authority by way of making his personal appearance adducing and producing any material particulars in the matter. As such the authority has no option but to declare the proceedings ex-



parte and decide the matter on merits by taking into account legal/factual propositions as raised by the complainant in his complaint.

3. Since, the buyer's agreement has been executed on 16.03.2013 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
4. The particulars of the complaint case are as under: -

Nature of project: Residential

DTCP license number: 13 of 2012

Valid up to: 21.02.2016

License holders name: Prime IT Solution

1.	Name and location of the project	"Our Homes", Sector 37-C, Gurugram
2.	RERA registered/ not registered.	Not registered
3.	Apartment/unit no.	1099A on 10 th floor, block/tower 'Iris'
4.	Apartment measuring	48 sq. mtr.
5.	Provisional allotment letter	23.10.2012
6.	Date of execution of apartment buyer's agreement	16.03.2013



7.	Payment plan Annexure A	Time linked payment plan
8.	Total consideration As per calculation of interest dated 14.07.2016 Annexure 3	Rs 15,66,968/-
9.	Total amount paid by the complainant till date As per calculation of interest dated 14.07.2016 Annexure 3	Rs 9,07,192/-
10.	Date of delivery of possession as per clause 3(a) of apartment buyer's agreement (36 months + 6 months grace period from the date of commencement of construction upon receipt of all approvals)	16.09.2016 (calculated from date of execution of agreement)
11.	Delay in handing over possession till date	2 years 3 months 25 days
12.	Penalty as per clause 3(c)(iv) of the agreement	Rs.10/- per sq. ft. per month of the carpet area of the said flat.

5. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. 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 16.09.2016. Neither the respondent has delivered the possession of the said unit as on date to the



purchaser nor they have paid any compensation @ Rs.10/- per sq. ft. per month of the carpet area of the said flat for the period of such delay as per clause 3(c)(iv) of apartment buyer's agreement dated 16.09.2016. Therefore, the promoter has not fulfilled his committed liability as on date.

6. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance.. The reply has not been filed by the respondent till date even after service of three notices consecutively for the purpose of filing reply. Hence, ex-parte proceedings have been initiated against the respondent.

FACTS OF THE COMPLAINT:

7. That the respondent gave advertisement in various leading newspapers about their forthcoming project named " Our Homes" promising various advantages like world class amenities and timely completion of the project. Relying on the promises and undertakings given by the respondent in the aforesaid advertisements Mrs. Sudha Yadav booked an



apartment admeasuring 48 sq. ft. in the aforesaid project of the respondent for total sale consideration of Rs 16,00,000/- which includes BSP, car parking, IFMS, Club membership, PLC.

8. The complainant made payment of Rs 9,07,192 to the respondent vide different cheques on different dates.
9. That as per flat buyers agreement the respondent had allotted a unit no 1099A on 10th floor in tower IRIS having super area of 48 sq. mt. to the complainant.
10. That the complainant regularly visited the site but was surprised to see that construction work is not in progress and no one was present at the site to address the queries of the complainant. The only intention of the respondent was to take payments for the project without completing the work.
11. That it could be seen that the construction of the project in which the complainants flat was booked with a promise by the respondent to deliver the flat by 23.10.2015 but was not completed within time for the reasons best known to the respondent.



12. The complainant visited the site but are shocked to see that no construction was going on.
13. That due to this omission on the part of the respondent the complainant has been suffering from disruption on her living arrangement, mental torture and also continues to incur severe financial losses.
14. This could be avoided if the possession was delivered on time.
15. That on the ground of equity the respondent also be subjected to pay the same rate of interest hence the respondent is liable to pay an interest @18% per annum.
16. That the complainant has requested the respondent several times for delivery of possession but the respondent has flatly refused.



ISSUE RAISED BY THE COMPLAINANT:

17. The following issue have been raised by the complainant:

- i. Whether or not the respondent has delayed possession of the unit by violating the terms and conditions of the builder buyers agreement?

RELIEF SOUGHT BY THE COMPLAINANT:

18. The complainant is seeking the following reliefs:
 - i. Direct the respondent to handover the possession of the flat along with interest @18% per annum on compounded rate from the promised date of delivery till the actual possession of the flat is delivered to complaint.
 - ii. Any other relief which this hon'ble authority deem fit and proper to meet the ends of justice.

DETERMINATION OF ISSUES:

19. After considering the facts submitted by the complainant, and perusal of record on file, the issues wise findings of the authority are as under:
 - i. With respect to the **first issue** raised by the complainant, the authority came across that as per clause 3(a) of apartment buyer's agreement, the possession of the flat



is to be handed over within 36 months from the date of commencement of construction (with a grace period of 6 months) upon receipt of all project related approvals. In the present case the due date shall be calculated from date of agreement i.e. 16.03.2013 as date of commencement of construction is not available The clause regarding the possession of the said unit is reproduced below:

“3(a) offer of possession

...the Developer proposes to handover the possession of the said flat within a period of thirty-six (36) Months with grace period of 6 Months, from the date of commencement of construction upon receipt of all project related approvals including sanction of building plan/ revised plan and approvals of all concerned authorities including the fire service department , civil aviation department , traffic department , pollution control department etc. as may be required for commencing, carrying on and completing the said complex subject to force majeure, restraints or restriction from any court/authorities...”



Accordingly, the due date of possession was 16.09.2016 and the possession has been delayed by 2 years 3 months 25 days till the date. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. per month of the carpet area

of the said apartment as per clause 3(c)(iv) of apartment buyer's 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."

As the promoter has failed to fulfil his obligation under section 11(4)(a), the promoter is liable under section 18(1) proviso to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession.



FINDINGS OF THE AUTHORITY:

20. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

21. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon promoter.

22. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation

23. The complaint was filed on 11.07.2018. Notices w. r. t. hearing of the case were issued to the respondent 06.08.2018, 13.09.2018 and 17.10.2018 for making his appearance. Besides this, a penalty of Rs. 5000/- and 10,000



was imposed on 13.09.2018 and on 17.10.2018 for non filing of reply even after service of notice. A final notice dated 31.12.2018 by way of email was sent to both the parties to appear before the authority on 10.01.2019.

24. As per clause 3(a) of the builder buyer agreement dated 16.03.2013 for unit no 1099-A, 10th floor, tower Iris in the project "Our Homes", Sector 37 C, Gurugram possession was to be handed over to the complainant within a period of 36 months+ 6 months grace period from date of execution of agreement which comes out to be 16.09.2016. However the respondent has not delivered the unit in time.

DECISION AND DIRECTIONS OF THE AUTHORITY

25. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:



- i. The respondent was duty bound to hand over the possession of the said unit by 16.09.2016 as committed by the respondent.
- ii. The respondent is directed to give interest to the complainant at the prescribed rate of 10.75% on the amount deposited by the complainant for every month of delay from the due date of possession i.e. 16.09.2016 till date as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016.
- iii. Thereafter the respondent shall pay monthly interest till handing over the possession which shall be paid before 10th of subsequent month.
- iv. The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order failing which the complainant is entitled to seek refund the paid amount with interest



26. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered &

for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch.

27. The order is pronounced.

28. 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

Date: 10.01.2019

Judgement uploaded on 22.01.2019

HARERA
GURUGRAM

