

PROCEEDINGS OF THE DAY

Day and Date	Monday and 21.01.2019
Complaint No.	733/2018 Case Titled As Surender Singh V/S Apex Buildwell Pvt Ltd
Complainant	Surender Singh
Represented through	Complainant in person with Shri Pawan Kumar Advocate.
Respondent	M/S Apex Buildwell Pvt Ltd
Respondent Represented through	None for the respondent.
Last date of hearing	
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 24.8.2018. Notices w.r.t. reply to the complaint were issued to the respondent on 21.9.2018, 16.11.2018 and 29.11.2018. Besides this, a penalty of Rs.5,000/- and Rs.10,000/- was also imposed on 16.11.2018 and 29.11.2018 for non-filing of reply even after

service of notices. However, despite due and proper service of notices, the respondent neither filed the reply nor come present before the authority. From the above stated conduct of the respondent, it appears that respondent does not want to pursue the matter before the authority by way of making personal appearance by adducing and producing any material particulars in the matter. As such, the authority has no option but to proceed ex-parte against the respondent and to decide the matter on merits by taking into a count legal/factual propositions, as raised, by the complainant in his complaint.

A final notice dated 14.1.2019 by way of email was sent to both the parties to appear before the authority on 21.1.2019.

Brief facts of the matter are as under :-

As per clause 3 (a) of the Builder Buyer Agreement dated 16.5.2013 for unit No.377, 3rd floor, in project "Our Homes", Sector-37C, village Garuli Khurd, District Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of commencement of construction + 6 months grace period which comes out to be 16.11.2016. It was a construction linked payment plan. Complainant has already paid Rs.15,66,968/- to the respondent against a total sale consideration of Rs.16,53,368/-. However, the respondent has miserably failed to deliver the unit in time and there are no chances to deliver the unit to the complainant in near future. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 16.11.2016 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 seek refund of 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)
21.1.2019

Subhash Chander Kush
(Member)

BEFORE THE HARYANA REAL ESTATE REGULATORY

AUTHORITY, GURUGRAM

Complaint no. : 733 of 2018
First date of hearing: 21.1.2019
Date of decision : 21.1.2019

1. Surender Singh
R/o: House no.351, gali no. 2, Surat
Nagar, Phase-II, Gurugram **...Complainants**
2. Yogender Yadav
R/o: Village Dungaraus, Tehsil and
District Rewari, Haryana

Versus

M/s Apex Buildwell Pvt. Ltd. **...Respondent**
Office: 202, DLF City Centre, M.G. Road,
Gurugram, Haryana
Regd. Office: 14-A/36, W.E.A – Karol Bagh,
New Delhi - 110005

CORAM:

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

APPEARANCE:

Shri Surender Singh, Yogender Yadav **Complainants in person**
Shri Pawan Kumar **Advocate for the complainants**
None for the respondent **Advocate for the respondent**



ORDER

1. A complaint dated 24.8.2018 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 complainants Mr. Surender Singh and Mr. Yogender Yadav against the promoter M/s Apex Buildwell Pvt. Ltd. in respect of apartment/unit described below in the project "Our Homes", on account of violation of the section 11(4)(a) of the Act *ibid*.
2. The complaint was filed on 24.8.2018. Notices w.r.t. hearing of the case were issued to the respondent on 21.9.2018, 16.11.2018 and 29.11.2018 for making his appearance. 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 apartment buyer's agreement has been executed on 16.5.2013 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 are as under: -

***Nature of the project:** Residential group housing colony

***DTCP license no:** 49 of 2011 dated 1.6.2011

1.	Name and location of the project	"Our Homes", Sector-37C, Village Garuli Khurd, Tehsil and District Gurugram, Haryana
2.	Registered/Unregistered	Not registered
3.	Payment plan	Construction linked payment plan
4.	Date of buyer's agreement	16.5.2013
5.	Unit no.	377, 3 rd floor, tower Tulip



6.	Area of unit	48 sq. mts'
7.	Total consideration	Rs.16,53,368/- (annexure-C5)
8.	Total amount paid by the complainant	Rs.15,66,968/- (annexure-C5)
9.	Due date of possession clause 3(a) – within 36 months + 6 months grace period from the date of commencement of construction of the complex upon receipt of all approvals	16.11.2016 (date of commencement of construction cannot be ascertained. So due date is calculated from date of execution of agreement)
10.	Delay in offering possession till date	2 years 2 months 5 days (approx.)
11.	Penalty as per clause 3(c)(iv)	Rs.10/- per sq. ft' of carpet area per month

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Despite service of notice the respondent neither appeared nor file 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.



FACTS OF THE CASE

6. The project “Our Homes” is a low cost/affordable group housing project and the authority has jurisdiction to decide

the present suit. The respondent promised to deliver the project within time agreed in the agreement. They also assured the consumers that they have secured all the necessary sanctions and approvals from the appropriate authorities for construction and completion of the real estate project.

7. In May, 2013, the respondent through various mediums approached the complainants with an offer to buy a low cost affordable house in their project. The respondent showed brochures of the project to the complainants and assured that the allotment letter and apartment buyer's agreement would be issued to the complainants within 1 week of booking made by the complainants.
8. Relying upon these assurances, the complainant booked residential apartment no.377 on 3rd floor, tower Tulip having super area of 48 sq. mts'. Accordingly, the complainants have paid Rs. 4,12,360/- through cheques dated 10.5.2013 as booking amount as per application form dated 11.5.2013.



9. The respondents assured that they would issue the allotment letter at the earliest but they only issued a buyer's agreement dated 13.5.2013 and did not issue the allotment letter even after repeated requests. The basic sale price as agreed in the buyer's agreement was Rs.16,00,000/- which includes EDC, IDC as levied by DTCP along with reserved car parking. It was agreed by the respondent at the time of the agreement that there would be no change in the area of the apartment or the price of the apartment.
10. The complainants paid the instalments as and when demanded by the respondents. At the time of signing of the agreement, the respondent by using its arbitrary power coerced the complainants to sign the illegal agreement. When the complainants refused to sign this agreement, the respondent threatened to forfeit the booking amount.
11. As per clause 3 of the agreement, the respondent promised to deliver the possession of the unit within 42 months from the date of agreement but till today possession has not been delivered. The complainants have jointly and severally paid



the entire sale consideration of Rs.15,66,968/- to the respondent.

12. The complainants approached the respondents to enquire about the date of delivery of possession but no satisfactory answer was given to them. The complainants also informed the respondent about their financial hardship of paying monthly rent of Rs. 40,000/- due to delay in getting possession but the respondent never cared. The respondent has committed grave deficiency in services and has also criminally misappropriated money paid by the complainants.
13. The complainants have paid Rs.8,80,000 as rentals @ Rs. 40,000 per month for rented accommodation for the period of delay i.e. 22 months from September, 2016 to July, 2018. The complainants have undergone severe mental harassment due to negligence on the part of respondent.
14. The cause of action occurred in favour of the complainants against the respondent on 16.5.2013 when they booked the said apartment and it further arose when respondent failed to deliver the said apartment.



15. ISSUES RAISED BY THE COMPLAINANT

- I. Whether the respondent has failed to deliver possession of the unit as per clause 3 of the agreement?
- II. Whether the respondent is guilty of unfair and fraudulent trade practice?
- III. Whether the apartment buyer's agreement is one-sided and unilateral?
- IV. Whether the complainants are entitled for the refund of sale consideration of Rs. 15,66,968/- along with interest @18% p.a.?
- V. Whether the respondent is liable to be prosecuted for contravening sections 11, 12, 14 and 15 of Real Estate Regulatory Act?

RELIEF SOUGHT

16. In view of the above, complainants seeks the following relief:

- I. To pass an order to direct the respondent to handover the possession of the apartment to the complainants.



- II. To direct the respondent to pay Rs.8,80,000/- to the complainants on account of non-delivery of possession within the stipulated time.
- III. To pass an order to direct the respondent to pay Rs.55,000/- to the complainants as cost of litigation.
- IV. Any other or relief which this hon'ble authority may deem fit and proper.

DETERMINATION OF ISSUES

17. With respect to the **first issue**, the authority came across clause 3(a) of the apartment buyer's agreement. The clause regarding the possession of the said unit is reproduced below:

“within 36 months + 6 months grace period from the date of commencement of construction of the complex upon receipt of all approvals”

Accordingly, the due date of possession was 16.11.2016 and there is a delay of 2 years 2 months 5 days approx.

18. With respect to the **second issue**, the complainants have made allegations without substantiating the same in material particulars. As such, this issue cannot be determined.



19. With respect to the **third issue**, the delay compensation payable by the respondent @ Rs.10/- per sq. ft. per month of the super area of the unit for the period of delay as per clause 3(c)(iv) of the 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. It has also been observed 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."

However, the apartment buyer's agreement is one-sided and unilateral.

20. With respect to the **fourth issue**, the apartment buyer's agreement was signed on 16.5.2013 and the due date of possession as per clause 3(a) is 16.11.2016 so there is a delay of 2 years 2 months 5 days (approx.). As the status of the



project cannot be ascertained by the complaint filed by the complainants, refund cannot be allowed at this moment. However, the complainants are entitled for delayed possession charges @10.75% on the amount paid from the due date of delivery of possession till the actual handing over of possession.

21. With respect to the **fifth issue**, the apartment buyer's agreement was executed on 16.5.2013 and the sections 12, 14 and 15 of the Real Estate Regulation Act will not apply retrospectively and there won't be any penal proceedings. With respect to section 11 of the Act, the due date of handing of possession was 16.11.2016 but the respondent has failed to fulfil his obligations to handover possession by the due date.

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 complainants at a later stage.

23. 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.

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

25. The complainants requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions of the Act and to fulfil its obligations.

26. As per section 18(1) proviso the respondent is liable to pay interest to the complainants, at the prescribed rate, for every



month of delay till the handing over of possession. The authority issues directions to the respondent u/s 37 of the Real Estate (Regulation and Development) Act, 2016 to pay interest at the prescribed rate of 10.75% per annum on the amount deposited by the complainants with the promoter.

27. As required by the authority, the respondent has to file reply within 10 days from the date of service of notice. Additional time period of 10 days is given on payment of a penalty of Rs. 5,000. Subsequent to this, last opportunity to file reply within 10 days is given on payment of a penalty of Rs. 10,000.
28. Such notices were issued to the respondent on 21.9.2018, 16.11.2018 and 29.11.2018.
29. As the respondent has failed to submit the reply in such period, despite due and proper service of notices, the authority may proceed ex-parte on the basis of the facts available on record and adjudge the matter in the light of the facts adduced by the complainant in its pleading. To prove the communication of date of hearing to respondent, it is sufficient to prove that such information was available with



the website and an electronic communication (e-mail) was served on the respondent.

DECISION AND DIRECTIONS OF THE AUTHORITY:

30. 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. Since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation and 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.
- ii. Complaint was filed on 24.8.2018. Notices w.r.t. reply to the complaint were issued to the respondent on 21.9.2018, 16.11.2018 and 29.11.2018. Besides this, a penalty of Rs.5,000/- and Rs.10,000/- was also imposed on 16.11.2018 and



29.11.2018 for non-filing of reply even after service of notices. However, despite due and proper service of notices, the respondent neither filed the reply nor come present before the authority. From the above stated conduct of the respondent, it appears that respondent does not want to pursue the matter before the authority by way of making personal appearance by adducing and producing any material particulars in the matter. As such, the authority has no option but to proceed ex-parte against the respondent and to decide the matter on merits by taking into account legal/factual propositions, as raised, by the complainants in their complaint.

- iii. A final notice dated 14.1.2019 by way of email was sent to both the parties to appear before the authority on 21.1.2019.
- iv. As per clause 3 (a) of the apartment buyer's agreement dated 16.5.2013 for unit no. 377, 3rd floor, in project "Our Homes", Sector-37C, village



Garuli Khurd, District Gurugram, possession was to be handed over to the complainants within a period of 36 months from the date of commencement of construction + 6 months grace period which comes out to be 16.11.2016. It was a construction linked payment plan. Complainants have already paid Rs. 15,66,968/- to the respondent against a total sale consideration of Rs.16,53,368/-. However, the respondent has miserably failed to deliver the unit in time and there are no chances to deliver the unit to the complainants in near future. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 16.11.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till the handing over possession failing which the complainants are entitled to seek refund of the amount.

- v. 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.

31. Complaint is disposed of accordingly.

32. Detailed order will follow.

33. File be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.1.2019

Judgment uploaded on 31.1.2019

HARERA
GURUGRAM

