

**PROCEEDINGS OF THE DAY**

Day and Date	Thursday and 10.01.2019
Complaint No.	545/2018 Case Titled As Ms. Payal Gupta V/S M/S Shiv Ganesh Buildcon Pvt. Ltd. & Ors.
Complainant	Ms. Payal Gupta
Represented through	Shri V.P.Munjhal Advocate for the complainant
Respondent	M/S Shiv Ganesh Buildcon Pvt. Ltd. & Ors.
Respondent Represented through	<b>None for the respondent.</b>
Last date of hearing	13.9.2018
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.

Shri V.P.Munjhal Advocate has appeared on behalf of the complainant and filed power of attorney.

Arguments heard.

Complaint was filed on 18.7.2018. 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. 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 his personal appearance by adducing and producing any material particulars in the matter. As such, the authority has no option but to declare the proceedings ex-parte and to decide the matter on merits by taking into account legal/factual propositions as raised by the complainant in his complaint.

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 13.3 of the Space Buyer Agreement dated 5.10.2011 for unit No.1601, 15<sup>th</sup> floor, tower-E, in project "Universal Aura", Sector-82, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of BBA or from the date of approval of building plans i.e. 17.5.2012 + 6 months grace period which comes out to be **17.11.2015**. It was a construction linked payment plan. Complainant has already paid Rs.66,83,968/- to the respondent against a total sale consideration of Rs.71,39,275/-. However, the respondent has miserably failed to deliver the unit in time and there are no chances to deliver the unit in near future. As such, authority has no option but to direct the respondent to refund the amount paid by the complainant alongwith

New PWD Rest House, Civil Lines, Gurugram, Haryana नया पी.डब्ल्यू.डी. विश्राम गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

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 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. : 545 of 2018**  
**First date of hearing : 13.09.2018**  
**Date of decision : 10.01.2019**

Ms. Payal Gupta,  
R/o. H.no.971, Sector 31,  
Gurugram-122001, Haryana.

**Complainant**

**Versus**

1. M/s Shiv Ganesh Buildcon Pvt. Ltd.

Address: 102, Antriksh Bhawan,  
22, Kasturba Gandhi Marg,  
New Delhi-110001.

2. M/s Universal Buildwell Pvt. Ltd

Address: Universal Trade Tower, 8<sup>th</sup> floor,  
Sector 49, Sohna Road-122018.

3. Shri Raman Puri

Address: H.no.59B, C-5,  
Sainik Farm, Neb Sarai-110062.

4. Shri Vikram Puri

Address: H.no.59B, C-5,  
Sainik Farm, Neb Sarai-110062.

5. Shri Varun Puri

Address: H.no.59B, C-5,  
Sainik Farm, Neb Sarai-110062.

**Respondents**



**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri V.P.Munjil

None for the respondents

Advocate for the complainant

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**ORDER**

1. A complaint dated 18.07.2018 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 Ms. Payal Gupta, against the promoters M/s Universal Buildwell Pvt. Ltd. and others, on account of violation of the clause 13.3 of apartment buyer's agreement executed on 05.10.2011 in respect of unit described below for 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 apartment buyer's agreement has been executed on 05.10.2011 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: -

- **Nature of the project- Residential group housing colony.**
- **DTCP license no.- 51 of 2011**
- **License valid/renewed upto- 04.06.2015**
- **License holder- M/s Shiv Ganesh Buildcon Pvt. Ltd.**

1.	Name and location of the project	“Universal Aura”, Sector 82, Gurugram.
2.	Project area	11.231 acres
3.	Registered/ not registered	<b>Not registered</b>
4.	Unit no.	1601, 15 <sup>th</sup> floor, tower E
5.	Unit measuring as per letter dated 12.12.2013 at page 73 of the complaint	1824.73 sq. ft. [initially 1587 sq. ft. as per the agreement dated 05.10.2011]
6.	Date of execution of space buyer’s agreement	05.10.2011
7.	Payment plan annexed as annexure-III to the said agreement	Construction linked payment plan [Page 43 of complaint]
8.	Basic sale price of the unit	Rs.48,40,350/-
9.	Total sale consideration as alleged by the complainant	Rs.71,39,275/-
10.	<b>Total amount paid</b> by the complainant till date as alleged by the complainant	Rs.66,83,968/- [Page 90 of complaint]
11.	Statement of account dated 23.04.2015	<b>Annexure VII</b> Page 91 of the complaint
12.	Photographs of the project annexed by the complainant	<b>Annexure X</b> [Page 94 of complaint]
13.	Building plans approved on (as alleged by the complainant)	17.05.2012



14.	Due date of delivery of possession as per clause 13.3 of apartment buyer's agreement i.e. [36 months + 180 days from the date of approval of building plans (17.05.2012) and/or execution of the apartment buyer's agreement (05.10.2011) whichever is later.]  <b>[Note: Computing from 17.05.2012 as building plans were approved later.]</b>	17.11.2015
15.	Delay in handing over possession till date of decision	3 years 1 month and 23 days.
16.	Penalty clause as per apartment buyer's agreement dated 05.10.2011	Clause 13.4 of the said agreement i.e. Rs.10/- per sq. ft. of the super area for every month of delay thereafter until the actual date fixed by the company for handing over of possession of the said apartment.

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondents. An apartment buyer's agreement is available on record for the aforesaid unit according to which the possession of the said unit was to be delivered by 17.11.2015. 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/- sq. ft. per month



for the delay in handing over possession of the unit. 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 for appearance. The case came up for hearing on \_\_\_\_\_. 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.

#### **Facts of the complaint**

6. Briefly stated, the facts of the complaint are that license no. 51 of 2011 was granted to Shiv Ganesh Buildcon Pvt. Ltd. for 11.231 acres to construct a residential project on 05.06.2011. The associates of Shiv Ganesh Buildcon Pvt. Ltd. i.e. Universal Buildwell Pvt. Ltd. has started registration of apartments in residential project named 'Universal Aura' in Sector 82, Gurugram in the year 2010 prior to the grant of license and sanction of building plans.
7. The complainant submitted that a 3 BHK unit measuring 1587 sq. ft. by depositing Rs.4,50,000/- as booking amount and the same was acknowledged vide receipt dated 31.12.2010. The unit no. 1601, tower E, 15<sup>th</sup> floor was allotted to the





complainant vide provisional allotment letter dated 21.04.2011.

8. The complainant submitted that the construction work started at site in August 2011. The instalment for the stage 'on commencement of excavation' and the same was deposited by the complainant on 03.08.2011. Although, the builder was not entitled to receive booking amount or further instalment prior to grant of license and sanction of building plan, yet an amount of Rs.17,92,614 was realised by the respondent prior to the grant of license (5.6.2011) and sanction of building plan (17.5.2012) illegally and against rules.
9. The complainant submitted that he made total payment of Rs.66,83,968/- as against the total cost of Rs.71,39,275/-. The builder buyer's agreement was executed on 05.10.2011 and the building plans were approved by the competent authority on 17.05.2012. The respondent vide letter dated 12.12.2013 intimated about the increase in super area of apartment from 1587 sq. ft. to 1824 sq. ft. and demanded Rs.6,20,712/- on account of increase in super area.
10. The complainant submitted that as per clause 13.3 of builder buyer agreement, the possession of the apartment was to be handed over within a period of 36 months from the date of approval of building plans and/or execution of the apartment



buyer agreement whichever is later. A further grace period of 180 days for unforeseen delays in obtaining the occupation certificate from DTCP. The grace period is not applicable as it was for the delay in obtaining occupation certificate which has not been applied. As such the scheduled date of offer of possession was June 2015.

11. The complainant submitted that the construction work is stalled at site since last three and half years. On visiting the office of the builder, false assurances were given for handing over the possession of apartment. The builder has violated the provisions of apartment buyer's agreement.

**Issues to be decided:**

12. **The relevant issues in the present complaint are as follows:**
- Whether the work has been delayed or stopped by the builder?**
  - Whether the respondent has violated the provisions of the apartment buyer's agreement?**

**Reliefs sought by the complainant:**

13. **The complainant is seeking refund of the entire amount deposited i.e. Rs.66,83,968/- along with interest @ 24%**



**per annum with effect from the date of deposit of the amounts upto the date of refund by the builder.**

### **Determination of issues**

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

14. With respect to the **first issue** raised by the complainant, in the present complaint the complainant has opted for construction linked payment plan. It is evident from the statement of account dated 23.04.2015 that the last payment was raised by the respondent on 10.10.2014 (page 75 of the complaint) on account of 'on completion of brick work' and thereafter no demand has been raised by the respondent. It shows that the construction work at the project was stopped for more than 3 years and 1 month.
15. With respect to the **second issue** raised by the complainant, as per clause 13.3 of apartment buyer's agreement, the possession of the said unit was to be handed over within 36 months plus grace period of 180 days from the execution of the said agreement or approval of building plan whichever is later. The agreement was executed on 05.10.2011 and the building



plans were approved on 17.05.2012. Therefore, due date of possession shall be computed from 17.05.2012.

*“...the company proposes to handover the possession of the said apartment to the allottee within a period of 36 months from the date of approval of the building plans and/or execution of the apartment buyer agreement whichever is later and subject to terms and conditions and limitations mentioned in the apartment buyer agreement (commitment period). The allottee further agrees and understands that the company shall additionally be entitled to a period of 180 days (grace period), after the expiry of the said commitment period to allow for unforeseen delays in obtaining the occupation certificate etc., from the DTCP under the Act, in respect of the project.”*

16. Accordingly, the due date of possession was 17.11.2015 and the possession has been delayed by three years one month and twenty four days from due date of possession till the date of decision. Keeping in view the dismal state of affairs with regard to status of the project and non-appearance of the respondent despite service, the authority is left with no option but to order refund of the entire amount deposited by the complainant along with prescribed rate of interest as per section 18(1) proviso read with rule 15 of the Rules *ibid*.

The delay compensation payable by the respondent @ Rs.10/- per sq. ft. of the super area for every month of delay thereafter until the actual date fixed by the company for handing over possession as per clause 13.4 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 others. (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.”.*

### **Findings of the authority**

17. **Jurisdiction of the authority-** 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town & 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 entertain the present complaint.

18. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter. The complainant requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.
19. 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. Such notices were issued to the respondent on 06.08.2018, 13.09.2018 and 17.10.2018. As the respondent has failed to submit the reply in such period, 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 his personal appearance by adducing and producing any material particulars in the matter. As such, the authority has no option but to declare the proceedings ex-parte and to



decide the matter on merits by taking into a count legal/factual proportions as raised by the complainant in his complaint. 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.

20. As per clause 13.3 of the space buyer agreement dated 05.10.2011 for unit no. 1601, 15<sup>th</sup> floor, tower-E, in project “Universal Aura”, Sector-82, Gurugram, possession was to be handed over to the complainant within a period of 36 months from the date of execution of BBA or from the date of approval of building plans i.e. 17.05.2012 + 6 months grace period which comes out to be 17.11.2015. It was a construction linked payment plan. Complainant has already paid Rs. 66,83,968/- to the respondent against a total sale consideration of Rs. 71,39,275/-. However, the respondent has miserably failed to deliver the unit in time and there are no chances to deliver the unit in near future.

#### **Directions of the authority**

21. 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 direct the respondent to refund the entire amount of Rs.66,83,968/-



paid by the complainant along with prescribed rate of interest i.e. 10.75% p.a. within a period of 90 days from the date of issuance of this order .

22. The project is registerable and has not been registered by the promoters. The authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Act.
23. The order is pronounced.
24. Case file be consigned to the registry. The copy of this order be endorsed to registration branch for further proceedings.

**(Samir Kumar)**

Member

Haryana Real Estate Regulatory Authority, Gurugram

**(Subhash Chander Kush)**

Member

Dated: 10.01.2019

Judgement Uploaded on 08.02.2019

