

PROCEEDINGS OF THE DAY

Day and Date	Thursday and 31.01.2019
Complaint No.	1368/2018 Case Titled As Sunil Gupta V/S M/S Umang Realtech Pvt Ltd
Complainant	Sunil Gupta
Represented through	Complainant in person with Shri Sukhbir Yadav Advocate
Respondent	M/S Umang Realtech Pvt Ltd
Respondent Represented through	Shri Prabhakar Tiwari Advocate for the respondent.
Last date of hearing	First hearing
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Project is registered with the authority.

Counsel for the complainant has filed written arguments.

Part occupation certificate has been received by the respondent on 28.7.2017 and revised date of possession is July 2020.

Arguments heard.

As per clause 7.1 of the Builder Buyer Agreement dated 5.4.2012 for unit No.502, Tower A, 5th floor, in project "Monsoon Breeze" Sector-78, Gurugram, possession was to be handed over to the complainant by 31.12.2013. However, even after lapse of five years, the respondent is unable to hand over the possession of the flat/unit as per the terms and conditions of BBA. Complainant has already paid Rs.88,35,541/- to the respondent

against a total sale consideration of Rs.93,78,377/-. It was a construction linked payment plan. Respondent has failed to fulfill his obligation to hand over the unit to the complainant in time, as such complainant requested for refund of the deposited amount. Considering all aspects of the matter, there is no option left with the authority but order to refund the amount alongwith prescribed rate of possession i.e. 10.75% per annum within a period of 90 days from the date of this order.

Complaint stands disposed of. Detailed order will follow. File be consigned to the registry.

Samir Kumar
(Member)
31.1.2019

Subhash Chander Kush
(Member)

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

Complaint No. : 1368 of 2018
First date of hearing : 31.01.2019
Date of Decision : 31.01.2019

Mr. Sunil Gupta
R/o H.no. 2 Ashoka Avenue, Westend Green
Rajokari, New Delhi-110038

...Complainant

Versus

M/s Umang Realtech Pvt. Ltd.,
Registered office: D64, 2nd floor, Defence
colony, New Delhi-110024

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sukhbir Yadav with Advocate for the complainant
complainant in person
Shri Prabhakar Tiwari Advocate for the respondent

ORDER

1. A complaint dated 18.10.2018 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. Sunil Gupta against the promoter M/s Umang Realtech Pvt. Ltd. on account of violation of



the clause 7.1 of buyer agreement executed dated 05.04.2012 in respect of apartment no. 502, tower A, 5th floor, admeasuring 2158 sq. ft. of the project 'Monsoon Breeze' located at Sector 78, Gurugram for not handing over possession of the subject plot on the due date i.e. by 31.12.2013 which is an obligation of the promoter/respondent under section 11(4)(a) of the Act ibid.

2. Since the floor buyer agreement dated 05.04.2012 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for noncompliance of contractual obligation on the part of the respondent in terms of the provision of section 34(f) of the Act ibid.
3. The particulars of the complaint are as under: -

1.	Name and location of the project	Monsoon Breeze, sector 78, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Apartment no.	502, tower A, 5 th Floor
4.	Area of apartment admeasuring	2158 sq. ft.
5.	Project area	12.514 acres
6.	DTCP Licence no.	38 of 2008
7.	Registered/unregistered	Registered



8.	HARERA registration no.	121 of 2017
9.	HARERA valid up to	30.06.2018
10.	Date of booking (as alleged by complainant)	01.08.2011
11.	Date of agreement	05.04.2012
12.	Total consideration	Rs. 93,78,377/- (as per statement of account)
13.	Total amount paid by the complainant	Rs. 88,35,541/- (as per statement of account)
14.	Payment plan	Construction Linked plan
15.	Date of delivery of possession (clause 7.1)	31.12.2013
16.	Delay in handing over possession till date	5 years 1 month
17.	Penalty clause as per apartment buyer's agreement dated 05.04.2012 (Clause 7.8)	Rs 10/- per sq. ft of the super area
18.	Status of the project	Part occupation certificate received dated 28.07.2017.

3. As per the details provided above, which have been checked as per record of the case file. An apartment buyer's agreement dated 05.04.2012 is available on record for unit no. 502, tower-A, 5th floor. The promoter has failed to deliver the possession of the said unit to the complainant. Therefore, the promoter has not fulfilled his committed liability as on date.



4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 31.01.2019. The case came up for hearing on 31.01.2019. The reply has been filed on behalf of the respondent has been perused.

Facts of the case

5. The complainant submitted that a real estate agent suggested for booking a flat at Monsoon Breeze project situated at sector 78, Gurugram promoted by a reputed builder/ developer i.e. the respondent company.
6. The complainant submitted that a local representative gave him a brochure, application form and price list and allured him with shady picture of the project. Marketing staff of builder assured to the complainant that the possession of the flat will be handed over on or before 31.12.2013, as construction was already initiated in the project.
7. The complainant submitted that he had purchased a flat in the above said project, bearing no. A-502 on 5th floor, tower A with



area admeasuring 2158 sq. ft. It was offered to the complainant with one covered car parking.

8. The complainant submitted that on 09.08.2011, an allotment letter was issued by the respondent in favour of him for apartment no. A 502, in the project “Monsoon Breeze-78”.
9. The complainant submitted that on 19.09.2011 and 12.11.2011 he issued two cheques in favour of respondent for Rs 7,52,211/- and Rs 21,115/- as per payment plan.
10. The complainant submitted that thereafter a pre printed, arbitrary, one sided and unilateral apartment buyer agreement was executed between both the parties on 05.04.2012. As per clause 7.1 of the agreement the due date of possession was 31.12.2013.
11. The complainant submitted that the respondent issued statement of account of flat no. A 502, which shows that complainant paid 95% amount i.e. Rs. 88, 35,541/- .
12. The complainant submitted that his main grievance is that in spite of the payment of more than 95% of the actual amount of the flat and ready and was willing to pay remaining amount, the



respondent party has failed to deliver the possession of flat on promised time.

13. The complainant submitted that there is a deficiency of service on the part of the respondent party and as such the respondent company is liable to be punished and compensate the complainant.

14. The complainant submitted that there is a clear unfair trade practice and breach of contract and deficiency in the services of the respondent party and much more a smell of playing fraud with the complainant and others is prima facie clear on the part of the respondent party which makes them liable to answer this hon'ble authority.

15. The complainant submitted that the cause of action arose in 2012 when the respondent imposed unreasonable terms on the allottees in the pre- printed apartment buyer's agreement. The cause of action further arose on 31.12.2013 when the respondent failed to give possession of the flat on the committed date. It was further submitted that the cause of action is still alive and continuing and will continue to subsist till such time as the



hon'ble authority restrains the respondent party by an order of injunction and passes the necessary orders.

16. The complainant submitted that he is entitled to get refund of the amount paid with interest @18% p.a. from the date of booking to till date of the refund.

Issues raised by the complainant

- i. Whether the developer has violated the terms and conditions of apartment buyer agreement?
- ii. Whether there is any reasonable justification for the delay to give possession of flat or abandoning the construction of the project?
- iii. Whether the respondent is liable for refund along with interest @ 18% p.a. from the date of booking till the date of refund?
- iv. Whether the respondent is liable to pay interest for every month of delay from the due date of possession till the handing over of possession u/s 18 of RERA Act, 2016?



Relief sought

- i. To direct the respondent party to refund the paid amount i.e. Rs 88,35,541/- along with interest @ 18% from the date of booking till date of refund on paid amount by the complainant to the respondent.
- ii. To direct the respondent to refrain from giving effect to the unfair clauses unilaterally incorporated in the apartment buyer agreement.

Respondent's reply

17. The respondent submitted that the present complaint is filed without any cause of action and only on experimental basis. It is pertinent to mention that the construction for the tower in which the apartment of the complainant is situated stands complete and the respondent has applied for the occupancy certificate for it as well.

19. The respondent submitted that the relationship of the complainant and the respondent is governed by the apartment buyer's agreement. It is further submitted that a specific clause for referring disputes to arbitration is included



in the said agreement, so the complainant ought to have resorted to arbitration instead of having approached this hon'ble authority with the captioned complaint. Thus, the hon'ble authority does not have any jurisdiction to entertain the present complaint.

20. The respondent submitted that the possession could not be handed over only because of the reasons which are beyond the control of the respondent and hence a reasonable extension of time is required in terms of clause 7.2 of the apartment buyer agreement. The delay caused was due to global recession as it hit the economy badly and is continuing particularly in the real estate sector. It is further submitted that the construction of the project is dependent upon the amount of money received from the bookings made and money being received from the allottees.

21. The respondent submitted that reduced number of booking along with the fact that several allottees of the project either defaulted in making payment of the instalments or cancelled the bookings in the project resulted in less cash flow to the



respondent henceforth causing delay in the construction of the project.

22. The respondent submitted that the occupancy certificate had been received for 11 towers and it has been applied for the remaining 4 towers, one of which the apartment of the complainant is situated. The respondent will receive the occupancy certificate soon and shall offer possession of the said apartment to the complainant. It is pertinent to mention that the said project is registered under RERA.

23. The respondent submitted that the present complaint requires elaborate evidence as it involves complicated questions of facts and law which cannot be adjudicated upon under the summary jurisdiction of this hon'ble authority. In this view, the complaint is liable to be dismissed with costs.

24. The respondent submitted that the liability of the respondent on account of delay is specified in the clause 7.8 of the apartment buyer agreement and as such the complainant cannot claim reliefs which are beyond the compensation agreed upon him. It is further submitted that the apartment buyer agreement delineates the respective liabilities of the



complainant as well as the respondent in case of breach of any of the conditions specified therein. In view of the matter, the complaint is liable to be dismissed in limine.

25. The respondent submitted that the complainant has approached with unclean hands. Firstly, the challenges being faced by the real estate industry as a whole are being simply brushed aside and secondly, the mechanism which has been put in place by the respondent to compensate the buyers for delay in completion of the project is being disregarded by him. It was never projected by the respondent that there may not be an eventuality of delay. Keeping any such eventuality in mind, the complainant had agreed to purchase the apartment. It may be appreciated that that the developer does not gain anything in case its project completion is delayed.



Written arguments on behalf of complainant

26. The complainant submitted that he has been filed to give the possession of flat on due date of possession. The first-time cause of action arose, when the respondent failed to deliver

the possession by committed date of 31.12.2013, given in apartment buyer agreement. The cause of action further arose when the respondent gave a new date of possession i.e. March 2017, and till date not able to deliver the possession and the cause of action is in continuation till the respondent hand overs the possession. It is pertinent to mention here that mere application for obtaining Occupancy Certificate (O.C) on 28.07.2017, doesn't mean they have been granted OC. Further it is not out of place to mention that the registration certificate issued to the respondent has also expired on 30.06.2018.

27. That the respondent made the complainant to sign a pre-printed apartment buyer agreement and never discussed the clauses of agreement, hence the clause of arbitration present in the agreement doesn't levy obligation on the complainant. Moreover, **the Hon'ble Supreme Court laid its finding in the Judgment of "M/S Emaar MGF Land Limited &Anr. v. Aftab Singh", 2017 and declaring that "Arbitration Clause Does not Bar Filing of Complaint"**, the Two-Judge Bench of the Supreme Court agreed with NCDRC's holding in July 2017



whereby, the National Commission ruled that an Arbitration Clause in buyer's agreement cannot circumscribe the jurisdiction of a consumer fora, notwithstanding the amendments made to Section 8 of the Arbitration Act. Therefore, the Hon'ble Haryana Real Estate Regulatory Authority, Gurugram already relying on the decision made by Supreme Court.

28. That it was promised by the respondent party at the time of receiving payment for the Flat that the possession of fully constructed Flat along like Parking, Landscaped lawns, etc. as shown in brochure at the time of sale, would be handed over to the complainant as soon as construction work is complete i.e. on or before 31.12.2013. The respondent kept on demanding money at first and when all the dues were paid by allottee, the respondent then deliberately lingered the project construction slowly, and surely not as per agreed terms and conditions of apartment buyer agreement. Moreover, the respondent didn't informed any reason of beyond the control of respondent like "Force majeure" justifying the delay as stated by respondent or by the counsel of the respondent in



their reply submitted to hon'ble authority. It is not out of place to mention here that the reasons listed by respondent in their reply submissions to the hon'ble authority are general and no specific records indicating reduced no. of booking, cancellations, defaults by customers, shortage of water, bricks, labour has been placed on record as evidence.

29. That since the respondent admitted about delay and his failure to deliver the apartment within the stipulated time committed as per agreement. That occupancy certificate is not granted to the respondent till date. That as per the statements of accounts the complainant has made each and every payment against the demand raised by the respondents and as per statement of accounts dated 10/10/2018, there is no interest of Rs 12,886/- being outstanding in name of complainant, and since the respondent unabashedly made a blatant attempt to mislead the Hon'ble Authority, he should be fined with heavy cost to assassinate the creditability of the complainant. It is pertinent to mention here that respondent had made the complainant to sign a pre-printed, unilateral Apartment buyer agreement and the terms and conditions



were never discussed with the complainant before making him sign the agreement. The respondent and his sales team while selling the apartment made a very rosy picture to lure the complainant and ensured that project will be completed even before the due committed by respondent in the Agreement.

30. The complainant submitted that after passing of Real Estate Regulatory Authority Act, 2016 it has been deal breaker for both allottee and builders as it has taken over the commercial transaction between builder and buyers, so the complainant after knowing the mechanism of HRERA, 2017 has filed his complaint to get a full refund of the amount paid by complainant along with prescribed rate of interest, or to deliver the possession of apartment along with the prescribed interest accumulated on such delay of almost 59 months.

31. That respondent had made the complainant to sign a pre-printed, unilateral and one-sided apartment buyer agreement and the terms and conditions were never discussed with the complainant before making him sign the agreement.



Moreover, in the Judgments passed by the Hon'ble authority also emphasized that these agreement between builder and buyers are One-sided "stating that if the buyer defaults the builder charges an interest of 18% and if builder defaults then compensations at Rs 5 per square feet will be provided to the buyer.

32. That respondent misrepresented about physical possession of flat and there is a clear unfair trade practice and breach of contract and deficiency in the services of the respondent party and attract heavy fine and penalty.
33. That as per section 12 of the RERA Act. 2016, the promoter is liable to returned entire investment along with interest to the allottees of an apartment, building or project for giving any incorrect, false statement etc. The relevant portion of Section 12 is reproduced hereunder:

Section 12: Obligations of promoter regarding veracity of the advertisement or prospectus:

Where any person makes an advance or a deposit on the basis of the information contained in the notice advertisement or prospectus, or on the basis of any model apartment, plot or building, as the case may be, and sustains any loss or damage by reason of any incorrect, false statement included therein, he shall be compensated by the promoter in the manner as provided under this Act:



Provided that if the person affected by such incorrect, false statement contained in the notice, advertisement or prospectus, or the model apartment, plot or building, as the case may be, intends to withdraw from the proposed project, he shall be returned his entire investment along with interest at such rate as may be prescribed and the compensation in the manner provided under this Act

In addition to the abovementioned provision, the Respondent is also bound by the **Haryana Real Estate Regulation Rules, 2017** which lists the interest to be computed while calculating compensation to be given by a Promoter to an allottee in case of a default. Section 15 of the said rules which is the relevant portion is reproduced hereunder:-

15. Interest Payable by promoter and allottee

*An allottee shall be compensated by the promoter for loss or damage sustained due to incorrect or false statement in the notice, advertisement, prospectus or brochure in the terms of section 12. In case, allottee wishes to withdraw from the project due to discontinuance of promoter's business as developers on account of suspension or revocation of the registration or any other reason(s) in terms of clause (b) sub-section (1) of Section 18 or **the promoter fails to give possession of the apartment/plot in accordance with terms and conditions of agreement for sale in terms of sub-section (4) of section 19. The promoter shall return the entire amount with interest as well as the compensation payable. The rate of interest payable by the promoter to the allottee or by the allottee to the promoter, as the case may be, shall be the State Bank of India highest marginal cost of lending rate plus two***



percent. *In case, the allottee fails to pay to the promoter as per agreed terms and conditions, then in such case, the allottee shall also be liable to pay in terms of sub-section (7) of section 19:*

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public

34. That the respondent also concealed material facts from this

Hon'ble Authority, by concealing the material fact that the Respondent has failed to give possession of the Flat to the complainant as per the time limit stipulated in the buyer agreement by the date 31.12.2013 therefore respondent is liable to refund amount along with prescribed rate of interest to the complainant for unreasonable delay.

35. That as per section 11 (4) of the RERA Act. 2016, the promoter is under obligation towards allottees. The relevant portion of Section 11(4) is reproduced hereunder:

11.4(a) The promoter shall be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:

Provided that the responsibility of the promoter, with respect to the structural defector any other defect for such



period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.

36. That as per section 18 of the RERA Act. 2016, the promoter is liable to return of amount and to pay compensation to the allottees of an apartment, building or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale. The relevant portion of Section 18 is reproduced hereunder:

18. Return of amount and compensation:-

(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,—

(a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or

(b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason,

he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:

Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed.

37. That as per section 19 (4) of the RERA Act. 2016, the promoter is entitle to refund of amount paid along with



interest. The relevant portion of Section 19 (4) is reproduced hereunder:

19 (4) The allottee shall be entitled to claim the refund of amount paid along with interest at such rate as may be prescribed and compensation in the manner as provided under this Act, from the promoter, if the promoter fails to comply or is unable to give possession of the apartment, plot or building, as the case may be, in accordance with the terms of agreement for sale or due to discontinuance of his business as a developer on account of suspension or revocation of his registration under the provisions of this Act or the rules or regulations made thereunder.

38. That after failure of respondent to give the possession of flat in year 2013, and failure to deliver possession on the new date committed by the respondent i.e. March 2017. The complainant had lost faith in the respondent company.
39. That the Respondent again misinterpreted the Section 31 and Section 71 of the said Act. and Rule 28 and Rule 29 of HARERA Rules.

Determination on issues

40. With respect to the **first issue** raised by the complainant, the respondent as per clause 7.1 was liable to handover the possession as per the committed date i.e. on or before 31.12.2013. So far there has been a delay of 5 years approximately and the respondent as per clause 7.8 is liable to



pay the penalty as per Rs 10/- per sq. ft. of the super area.

Therefore, the respondent is liable for breach of the agreement.

41. With respect to the **second issue** raised by the complainant, the respondent has given a reasonable justification for the delay caused in handing over the possession and that is mentioned in clause 7.2 of the agreement. The respective clause talks about force majeure events, which are beyond the control of the respondent and grants a reasonable extension of time to the developer to construct the project. Thus, the justification is provided as stated in clause 7.2 of the agreement.
42. With respect to the **third and fourth issue** raised by the complainant, the respondent has failed to fulfil his obligation to handover the unit to the complainant in time, as such complainant requested for refund of the deposited amount. Considering all aspect of the matter, there is no option left with the authority but order to refund the amount along with prescribed rate of possession i.e. 10.75% per annum within a period of 90 days from the date of this order.



Findings and directions of the authority

43. **Jurisdiction of the authority-** The authority has complete territorial jurisdiction to entertain the present complaint. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Principal Secretary (Town and Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial 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 complainant at a later stage.

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



45. 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.
46. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has decided to observe that Part occupation certificate has been received by the respondent on 28.7.2017 and revised date of possession is July 2020.
47. As per clause 7.1 of the builder buyer agreement dated 5.4.2012 for unit No.502, Tower A, 5th floor, in project "Monsoon Breeze" Sector-78, Gurugram, possession was to be handed over to the complainant by 31.12.2013. However, even after lapse of five years, the respondent is unable to hand over the possession of the flat/unit as per the terms and conditions of BBA. Complainant has already paid Rs.88,35,541/- to the respondent against a total sale consideration of Rs.93,78,377/-. It was a construction linked payment plan. Respondent has failed to fulfil his obligation to hand over the unit to the complainant in time, as such complainant requested for refund of the deposited amount. Considering all aspects of the matter, there is no option left with



the authority but order to refund the amount along with prescribed rate of possession i.e. 10.75% per annum within a period of 90 days from the date of this order.

Decision and direction of authority

48. 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:

- i. The respondent is directed to refund the amount along with prescribed rate of interest i.e.10.75% per annum within a period of 90 days from the date of this order.

35. The order is pronounced.

36. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member



Dated:31.01.2019

Judgement Uploaded on 12.02.2019