

PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 06.02.2019
Complaint No.	1577/2018 Case titled as Neeraj Jain V/S Fantasy Buildwell Pvt Ltd
Complainant	Neeraj Jain
Represented through	Shri R.S.Yadav Advocate for the complainant.
Respondent	M/S Fantasy Buildwell Pvt Ltd
Respondent Represented through	Shri Yogesh Srivastava AR on behalf of respondent company with Shri Jasdeep Singh Dhillon Advocate.
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.

As per clause 3.1 of the Builder Buyer Agreement dated 19.6.2013 for unit No.PL-3/1402, in Paras Quartier Project, Gurugram, possession was to be handed over to the complainant within a period of 42 months from the date of execution of BBA + 6 months grace period which comes out to be 19.6.2017. The complainant has paid a total sum of Rs.4,82,80,149/- against

a total sale consideration of Rs.6,18,20,000/-. It is on record that the respondent has not honoured its commitment to deliver the possession in time and the complainant too has not fulfilled his obligation to make timely payments to the respondent. Since RERA has come into force in May 2016 and as per Section 19 (6) of the RERA Act, both the parties are obligatory to fulfill their respective commitments. Since the due date of delivery of possession is 19.6.2017, as such, the complainant is directed to pay the due amounts with prescribed rate of interest @ 10.75% per annum and the respondent is also duty bound to give delayed possession charges at 10.75% p.a. to the complainant till the offer of possession.

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

Samir Kumar
(Member)
6.2.2019

Subhash Chander Kush
(Member)

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

Complaint No. : 1577 of 2018
Date of first hearing : 06.02.2019
Date of Decision : 06.02.2019

Sh. Neeraj Jain
R/o B-41, Gulmohar Park,
New Delhi-110049

...Complainant

Versus

M/s Fantasy Buildwell Pvt. Ltd.
Office at: 11th Floor, Paras Twin Towers,
Tower-B, Golf Course Road,
Sector 54, Gurugram-122002

...Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri R.S.Yadav Advocate for the complainant
Shri Jasdeep Singh Dhillon Advocate for the respondent
Shri Yogesh Srivastava Authorised representative on
behalf of the respondent
company

ORDER

1. A complaint dated 13.11.2018 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 Sh. Neeraj Jain,



against the promoter M/s Fantasy Buildwell Pvt. Ltd. on account of violation of clause 3.1 of the apartment buyer agreement executed on 19.06.2013 for unit no. PL-3/14 02 on 14th floor, tower 'Iconic', admeasuring super area 6000 sq. ft. approximately, in the project "Paras Quartier" for not giving possession on the due date which is an obligation of the promoter under section 11(4)(a) of the Act ibid.

2. Since the apartment buyer agreement has been executed on 19.06.2013, 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.
3. The particulars of the complaint are as under: -

1.	Name and location of the project	"Paras Quartier" in Sector 2, Village Gwal Pahari, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Unit no.	PL-3/14 02, 14 th floor, tower 'Iconic'
4.	Project area	10.096875 acres
5.	Unit area	6000 sq. ft.
6.	Registered/ not registered	Registered (164 of



		2017)
7.	Revised date of completion as per RERA registration certificate	28.08.2022
8.	DTCP license	74 of 2012 dated 31.07.2012
9.	Date of booking	27.01.2013 (as per annexure- 'R-2' payment schedule, pg 51 of the complaint)
10.	Date of apartment buyer agreement	19.06.2013
11.	Total consideration	Rs. 6,18,20,000/- (as per annexure- 'F', pg 48 of the complaint)
12.	Total amount paid by the complainant	Rs. 4,82,80,149/- (as per annexure R-2, pg 52 of the reply)
13.	Payment plan	Construction linked payment plan
14.	Date of delivery of possession	Clause 3.1- 42 months from date of execution of agreement, i.e. 19.06.2013 or date of obtaining all licenses or approvals for commencement of construction, whichever is later + 180 days grace period i.e. 19.06.2017 Note: No license or approval has been attached in the file. Thus, the due date of possession is calculated from the date of execution of agreement.
15.	Delay of number of months/ years	1 year 7 months



	upto 06.02.2019	
16.	Penalty clause as per apartment buyer agreement dated 19.06.2013	Clause 3.3- Rs. 5/- per sq. ft. per month of the super area

4. The details provided above have been checked on the basis of the record available in the case file which has been provided by the complainant and the respondent. An apartment buyer agreement dated 19.06.2013 is available on record for unit no. PL-3/14 02 on 14th floor, tower 'Iconic', admeasuring super area 6000 sq. ft. approximately, according to which the possession of the aforesaid unit was to be delivered by 19.06.2017. 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.
5. Taking cognizance of the complaint, the authority issued notice to the respondents for filing reply and for appearance. The case came up for hearing on 06.02.2019. The reply has been filed on behalf of the respondent and the same has been perused. Written arguments have been filed by the complainant wherein the complainant has re-asserted the facts stated in the complaint and denied the contentions of the respondent.



Facts of the complaint

6. The complainant submitted that upon the proposal of the respondent, on 27.01.2013, the complainant booked a unit in the project named "Paras Quartier", by paying an amount of Rs.50,00,000/- to the respondent. Accordingly, vide allotment letter dated 27.01.2013, the complainant was allotted a unit bearing no. PL-3/14 02 on 14th floor, in the tower 'Iconic'.
7. On 19.06.2013, an apartment buyer agreement was executed wherein as per clause 3.1, the possession should have been offered within 42 months from date of execution of agreement, i.e. 19.06.2013 or date of obtaining all licensed or approvals for commencement of construction, whichever is later + 180 days grace period. No license or approval has been attached in the file. Thus, the due date of possession is calculated from the date of execution of agreement. Accordingly, the due date of possession comes out to be 19.06.2017. The complainant made payments of all instalments demanded by the respondents amounting to a total of Rs 4,82,80,149/-.
8. The complainant submitted that the respondent failed to give possession on time and violated the terms of the agreement. It is further submitted that the respondent has been making



false assurances that he will give possession of the apartment very soon but till now the possession has not been handed over thereby defeating the very purpose of buying the flat. The promoter is in a threatening spree if the payment is not made as per the payment plan saying that he will seize the security as well as the apartment rights of the complainant without looking into his own conduct.

9. The complainant submitted that the respondent has violated the terms of section 4(d) of RERA, 2016 vide which he was bound to maintain a separate account and keep 70% money realized from the complainant to cover the cost of the construction etc. Further, as per section 11(1) of the said Act, the promoter is bound to provide inter-alia the quarterly information of up to date status of the project and as per section 11(4), the promoter shall be responsible for obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder. However, the promoter had neither given the possession on the due date nor updated the status of the dues received and spent on the project. As per section 13, no deposit or advance to be taken by the promoter without first entering into an agreement for sale. However, in the present



case, the promoter has taken registration charges on 27.01.2013 and entered into agreement on 19.06.2013.

10. The complainant further submitted that upon failure to complete the construction and handover the possession, as per section 18(1) of the said Act, the promoter shall be liable upon demand of the allottees, in case they wish to withdraw from the project, to return the amount received by him in respect of the unit in question.
11. The complainant submitted that on several occasions, he visited the office and the construction site and lodged protest against the stopping of construction in arbitrary manner and failure to handover possession on the due date. However, the respondent neither took notice of the personal protest of the complainant nor took cognizance against the illegal and arbitrary act of stopping construction at site despite making the full payment as per the agreement.
12. The complainant submitted that due to bad behaviour, illegal act and conduct of the respondent, the complainant suffered huge monetary loss which also resulted in mental agony and harassment.
13. **Issues to be determined**

No issues have been raised by the complainant. However, the



relevant issue as culled out from the complaint are:-

- I. Whether the complainant is entitled to refund of the principal amount of Rs.4,82,80,150/- paid by him along with interest at the prescribed rate?

14. Relief sought

- I. Direct the respondent to refund the sum of Rs.4,82,80,150/- along with interest at the prescribed rate.

Respondent's reply

15. The respondent submitted that the complainant has not come before this hon'ble authority with clean hands. The complainant has suppressed vital facts and on this ground alone, the complaint is liable to be dismissed. The complainant has also not disclosed the various defaults and breaches on his part in making the payments as per the agreed payment schedule.

16. The respondent submitted that the complainant herein is not genuine flat purchaser or consumer and has purchased the said flat for commercial and investment purposes. The same is also brought out from the fact that the complainant has defaulted in making timely payments of the outstanding installments as per the agreed schedule which is clearly



indicative of the fact that the complainant had booked the apartment with the sole motive of selling the same at a premium. Since the complainant has not been successful in selling the flat at a premium, they have stopped making payments as per the agreed schedule and has now filed this frivolous complaint just to avoid taking possession of the property and making the rest of the payments.

17. The respondent submitted that the complainant had booked the apartment for a total consideration of INR 6,18,20,000 and has till date made payments of only INR 4,82,80,149. Thereafter, the complainant has been called upon to make payments on completion of top floor, brick work, and on completion of internal plaster. Despite repeated notices issued to the complainant, he has failed to make the payment and the outstanding amount payable is Rs.1,48,82,806/-.

18. The respondent submitted that the construction of the unit is in the final finishing stages wherein after completion of the structure, brick work and internal plaster, the tiles and the window/door glass frames are under installation and the respondent would be willing to handover possession to the complainant subject to payment of the outstanding dues as per the apartment buyer agreement.



19. The respondent submitted that it is pertinent to mention here that the complainant herein has agreed to comply with clause 3.2 of the apartment buyer agreement which provides that the possession of the unit shall be handed over to the purchaser only upon payment of the complete sale consideration alongwith the other charges and outstanding dues payable in terms of the agreement. Moreover, the complainant herein has agreed to comply with the terms and conditions of the allotment letter, clause 16 of which stipulates that the respondent shall be entitled to reasonable extension of time if there is any default on the part of the complainant. Thus, the complainant cannot hold the respondent liable for not handing over possession when he himself has failed to make the payments as per the agreed schedule and is in breach of the apartment buyer agreement.
20. It is further submitted that the present project is a RERA registered project having registration no 164 of 2017 dated 29.08.2017 and the schedule for completion as per RERA approval is 28.08.2022, thus there is no delay at all on the part of the respondent and therefore, the present complaint being premature and infructuous merits outright dismissal.



21. The respondent submitted that the present complaint is not maintainable since not only is the complainant in breach of the apartment buyers agreement but also in violation of Real Estate (Regulation and Development) Act, 2016 and the Haryana Real Estate(Regulation and Development)Rules, 2017. Section 19 of RERA, 2016, lays down the rights and duties of the allottees and sub-clause(6) of section 19 provides that the allottee shall be responsible to make payments in the manner and as per the time specified in the agreement between the parties. In the present case it has been admitted by the complainant that he has failed to make payments as per the agreed schedule and therefore the complainant is in breach of the said Act and rules.
22. The respondent submitted that due to failure of the complainant in making the payments, the respondent has suffered immense monetary hardship.
23. The respondent submitted that the complainant has agreed to comply with clause 12.4 of the apartment buyers agreement which clearly stipulates that if the respondent has commenced construction then the complainant shall not have any right to cancel/withdraw the agreement for any reason



whatsoever. The project is in its advanced stage and even the flooring work has been completed.

24. The respondent further submitted that the complainant herein has also agreed that in terms of clause 3.5 of the apartment buyer agreement the respondent would be entitled to reasonable extension of time for construction of the project in the event of any delay.

25. The respondent submitted that the Hon'ble Supreme Court of India in the case ***Saradmani Kandappan and Ors Vs S. Rajalakshmi and Ors***, decided on 04.07.2011, (2011)12SCC18, in paras 33 and 34, while interpreting similar contracts involving performance of reciprocal promises in respect of immovable properties has interpreted sections 52, 53 and 54 of the Indian Contract Act, 1872 to hold that in case of a contract wherein payments are to be paid by the purchaser in a time bound manner as per the agreed payment plan and he fails to do so then the seller shall not be obligated to perform its reciprocal obligations and the contract shall be voidable at the option of the seller alone and not the purchaser. The above dictum is applicable in the present case as well since not only does the order of performance of reciprocal performances as per the



agreement mandate timely payments by the complainant but also since the complainant admitted in the complaint to not having paid the due and payable installments. Therefore the respondent is not obligated to complete construction and offer possession till the time the complainant performs his obligations under the agreement. Moreover, the complainant also cannot seek cancellation or refund under the apartment buyer agreement since they are in default and it is the respondent who can exercise his right to cancel the agreement or claim damages from the complainant for the defaults on his part.

26. The respondent submitted that the complainant does not have any valid or subsisting cause of action to file the present complaint. Moreover the complainant has not placed on record any document or communication at all wherein he has either inquired about the possession of the flat or has requested for a refund from the respondent.

27. The respondent submitted that the apartment buyer agreement is dated 19.06.2013 and the RERA Act is a 2016 enactment all the provisions of which came into effect in the month of May 2017 and for which the rules were notified by the government of Haryana in 2017. Thus the above



provisions are not applicable in the present case and even otherwise there has been no violation of the provisions of the RERA Act, 2016 by the respondent.

Determination of issues

28. After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:
29. In respect of the **sole issue** to be determined, as per clause 3.1 of the agreement dated 19.6.2013, the due date of possession comes out to be 19.06.2017. The respondent failed in handing over the possession on or before the said due date. However, the project is RERA registered wherein the respondent has undertaken to complete the construction by 28.08.2022. Thus, keeping in view the status of the project and the interest of other allottees, the authority is of the view that the complainant is not entitled to refund. However, the complainant is entitled to delayed possession interest at 10.75% p.a. to the complainant from the due date of possession, i.e. 19.06.2017 till the offer of possession.



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

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.

31. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Findings of the authority

32. **Jurisdiction of the authority-** The respondent admitted that as the project "Paras Quartier" is located in Sector 2, Village Gwal Pahari, Gurugram. 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 preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

33. As per clause 3.1 of the agreement dated 19.6.2013, possession was to be handed over to the complainant within a period of 42 months from the date of execution of agreement or approvals for commencement of construction, whichever is later + 180 days grace period. However, no license or approval has been attached in the file. Thus, the due date of possession is calculated from the date of execution of agreement. Thus, the due date of possession comes out to be 19.06.2017. The complainant has paid a total sum of Rs.4,82,80,149/- against a total sale consideration of Rs.6,18,20,000/-. It is on record that the respondent has not honoured its commitment to deliver the possession in time and the complainant too has not fulfilled his obligation to make timely payments to the respondent. Since the Real Estate (Regulation and Development) Act, 2016 has come into force in May 2016 and as per section 19 (6) of the RERA,2016, both the parties are under an obligation to fulfil



their respective commitments. Since the due date of delivery of possession is 19.06.2017, as such, the complainant is directed to pay the due amounts with prescribed rate of interest @ 10.75% per annum and the respondent is also duty bound to give delayed possession charges at 10.75% p.a. to the complainant from the due date of possession till the offer of possession.

Decision and directions of the authority

34. 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 pay the interest at the prescribed rate i.e. 10.75% per annum for every month of delay on the amount paid by the complainant from due date of possession, i.e. 19.06.2017 till the actual handing over of possession.

(ii) The respondent is directed to pay interest accrued from 19.06.2017(due date of possession) to 06.02.2019(date of this order) on account of delay in handing over of possession to the complainants within 90 days from the date of this order.



(iii) Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid before 10th of every subsequent month.

(iv) The complainant is directed to pay the due amounts with prescribed rate of interest @ 10.75% per annum.

35. The complaint is disposed of accordingly.

36. The order is pronounced.

37. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

(Subhash Chander Kush)

Member

Date: 06.02.2019

Judgement uploaded on 25.02.2019



HARERA
GURUGRAM