

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 29.01.2019
Complaint No.	1172/2018 Case Titled As Mr. Vishal Gupta V/S M/S Umang Realtech Pvt Ltd
Complainant	Mr. Vishal Gupta
Represented through	Complainant in person with Shri Dheeraj Talwar, Advocate
Respondent	M/S Umang Realtech Pvt Ltd
Respondent Represented through	Shri Arpit Dwivedi 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 vide registration No. __ and as per registration certificate, the revised date of possession is 31.12.2019.

Shri Dheeraj Talwar Advocate has appeared on behalf of the complainant and filed power of attorney today.

Arguments heard.

As per clause 7.1 of the Builder Buyer Agreement dated 27.11.2012 for unit No.1001, 10th floor, Tower-C, in project "**Winter Hills 77**", Sector-77 Gurugram, possession was to be handed over to the complainant by 31.12.2015 + 6 months grace period which comes out to be 30.6.2016 (**as per clause 7.1 of agreement**). However, the respondent has not delivered the unit in time. Complainant has already paid Rs.59,71,670/- to the

respondent against a total sale consideration of Rs.60,58,780/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 30.6.2016 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till handing over the possession failing which the complainant is entitled to seek refund of the amount.

As per affidavit submitted in respect of project "Winter Hills" the date of delivery of possession of the unit is June 2019.

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.

The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.

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

Samir Kumar
(Member)
29.1.2019

Subhash Chander Kush
(Member)

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

Complaint no. : 1172 of 2018
First date of hearing : 29.01.2019
Date of decision : 29.01.2019

Mr. Vishal Gupta,
R/o. Flat no. 602, Tower T-16,
CHD Avenue 71, Sector 71,
Gurugram-122001.

Complainant

Versus

M/s Umang Realtech Pvt. Ltd.
Office address: D-64, 2nd floor,
Defence Colony, New Delhi-110024.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Vishal Gupta Complainant in person
Shri Dheeraj Talwar Advocate for the complainant
Shri Arpit Dwivedi Advocate for the respondent

ORDER

1. A complaint dated 17.10.2018 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. Vishal Gupta, against the promoter M/s Umang Realtech Pvt. Ltd., on account of violation of the clause 7.1 of the apartment buyer's



agreement executed on 27.11.2012 in respect of apartment described below in the project 'Winter Hills 77' 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 27.11.2012 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 part of the promoter/respondent in terms of section 34(f) of the Act *ibid*.
3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Winter Hills 77", Sector 77, Gurugram, Haryana
2.	Nature of the project	Group housing colony
3.	DTCP license no.	67 of 2011 dated 16.07.2011
4.	Project area	16.54 acres
5.	RERA Registered/ not registered.	Registered
6.	HRERA registration number	GGM/10/2018 dated 25.07.2018 for area measuring 10.540 acres.
7.	HRERA registration certificate valid upto	31.12.2019
8.	Building plans approved on	30.01.2012
9.	Apartment/unit no.	1001, 10 th floor, tower C
10.	Apartment measuring	1260 sq. ft.



11.	Date of execution of apartment buyer's agreement-	27.11.2012
12.	Payment plan	Construction linked payment plan
13.	Basic sale price as per the said agreement	Rs.50,87,880/-
14.	Total cost of the said apartment as per the said agreement.	Rs.60,58,780/- (excluding taxes)
15.	Total amount paid by the complainant till date as admitted by the respondent	Rs.59,71,670/- (including taxes)
16.	Date of delivery of possession as per clause 7.1 of apartment buyer's agreement (31.12.2015 + 6 months grace period)	30.06.2016
17.	Delay in handing over possession till date of decision	2 years 7 months
18.	Penalty clause as per the said apartment buyer's agreement	Clause 7.9 of the agreement i.e. Rs.5/- per sq. ft. of super area of the said apartment per month.

4. 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 30.06.2016. Neither the respondent has delivered the possession of the said unit till date to the complainant nor it has paid any compensation @ Rs.5/- per sq. ft. of the super area of the said apartment per month as per clause 7.9 of



apartment buyer's agreement duly executed between the parties. 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 appearance. The respondent appeared on 29.01.2019. The case came up for hearing on 29.01.2019. The reply filed on behalf of the respondent on 21.11.2018 has been perused. The complainant has also filed a rejoinder wherein he has reasserted the facts stated in the complaint and has denied the contentions raised by the respondent in its reply.

Facts of the complaint

6. Briefly stated, the facts of the complaint are that the complainant, who was quite eager to have his own accommodation at the earliest possible, booked a flat in re-sale (from Mr. Jatin Kakkar) on 03.12.2013 in the said housing project for which he paid an amount of Rs.4,50,000/- vide cheque dated 04.12.2013 as advance money to Mr. Jatin Kakkar and balance amount of Rs.38,78,077/- was given on transferring date and the same is endorsed to the said agreement. So, M/s Umang Realtech Pvt. Ltd. has transferred all the rights in the said unit to Mr. Vishal Gupta.



7. The complainant submitted that the respondent has already issued the allotment letter dated 13.03.2012 pertaining to booking of apartment no. 1001, 10th floor, tower 'C' in the project "Winter Hills 77", Sector 77 (measuring 1260 sq. ft.), Gurugram.
8. The complainant submitted that he has ended up in making total payment of Rs.59,71,672/- to the respondent which is much more than the basic sale price of Rs.50,87,880/- of the apartment as mentioned in clause 3.2 of the said agreement. The respondent company very cleverly received such huge amount and that too, even without completing all their required works and respondent company mischievously stopped construction of the said project. Thus, all this very clearly indicates that the respondent has not only very cleverly cheated the complainant but has deliberately committed acts of fraud, conspiracy, criminal breach of trust etc.
9. The complainant submitted that the respondent company has very cleverly received payments even against those items such as club membership charges, external electrification charges, firefighting equipment charges, EDC etc. as back on 01.11.2012 itself from the complainant for which the respondent has actually not spent even a single paisa. Thus,



respondent deliberately, mischievously, fraudulently and illegally robbed the innocent complainant.

10. The complainant submitted that had the respondent acted fairly, ethically, honestly and lawfully, then the respondent could have very easily met the deadline of completing the entire construction well before their committed date i.e. 31.12.2015 in every manner and in all respect. But instead the respondent chose the path of unreasonableness, mischievousness and dishonestly by only focusing themselves in making easy huge unlawful gains to the fullest possible extent.
11. The complainant submitted that the respondent has totally failed to complete the construction of the said project despite of commitment under clause 7.1 of the said agreement that they would complete the construction latest by 31.12.2015. There are absolutely no signs of its completion in near future and totally stopped the construction and abandoned their said housing project in the midway from 2014 to April 2018. Even the news about stoppage of construction at the said project by the respondent company has also appeared in the leading newspaper 'Times of India' on 26.12.2017. The fact about the total stoppage of construction by the respondent has also



appeared in the famous newspaper 'Dainik Jagran' on 27.12.2017.

12. The complainant submitted that a few months back in January 2018, the complainant visited the site of the said group housing project and further observed to their extreme shock that no construction activity whatsoever is being carried out at the site. No labor, no machinery and no material was lying at the site for further construction which clearly confirmed that the respondents have already very mischievously and dishonestly abandoned their housing project in the halfway. As a result, the complainant has unnecessarily been going through unbearable huge mental tension, agonies, anxieties, frustrations and severe harassment apart from extreme serious financial crises during all these years who have given their entire life-time hard earned money, loans with heavy EMIs, etc. Therefore, the complainant is left with no alternative but to approach this hon'ble authority for justice and relief.

13. The complainant submitted that in January 2018 when he visited the site of the said housing project, observed that no construction activity is being carried out at the site and no labor, no machinery and no material was lying at site for further construction which clearly confirmed that the



respondents have already very mischievously and dishonestly abandoned the said project.

14. The complainant submitted that the complainant has unnecessarily been going through unbearable huge mental tension, agonies, anxieties, frustrations and severe harassment apart from extreme serious financial crises during all these years, loans with heavy EMIs, etc.

Issues to be decided

15. The complainant has raised the following issues:
- i. Whether the respondent has failed to complete the construction of housing project within the committed period, thereby violating the said agreement?
 - ii. Whether the respondent has made unlawful gains and illegally enriched themselves immensely who have mischievously and fraudulently recovered much more payment than the basic sale price of the apartment from the complainant?
 - iii. Whether the respondent has failed to obtain all the required licenses, sanctions, approvals, occupation certificate etc. from the competent authority?



- iv. Whether the respondent has failed to get the said project registered under RERA?
- v. Whether it is fair, reasonable and justified to recover payments against club membership, EDC, external electrification charges, fire fighting equipment charges, car parking charges etc. for which the respondent has not actually spent even a paisa thereon?

16. Reliefs sought:

The complainant is seeking the following reliefs:

- i. Direct the respondent to refund the amount paid by the complainant i.e. a sum of Rs.59,71,672/-.
- ii. Direct the respondent to give interest at the prescribed rate on the amount paid by the complainant.

Respondent's reply

17. The respondent submitted that the present complaint is filed without any cause of action and only on experimental basis. There is no deficiency of service or unfair trade practice on the part of the respondent.

18. The respondent submitted that as per clause 7.1 and 7.2 of apartment buyer's agreement, due date for possession is 31.12.2015 plus a grace period of 6 months. However, the



delay, if any, caused in handing over possession of apartment in question is because of force majeure conditions beyond the control of the respondent and so the respondent cannot be held liable for the alleged delay, if any.

19. The respondent submitted that the relationship of the complainant and the respondent is defined and decided by the apartment buyer's agreement executed between both the parties. It is submitted that a specific clause for referring disputes to arbitration, is there in clause 14.6 of the said agreement. Hence, both the parties are contractually bound by the said condition. In view of clause 14.6 of the said agreement, the captioned complaint is barred. Without admitting any of the allegations raised in the complaint, it is submitted that the complainant ought to have resorted to arbitration instead of having approached this hon'ble authority with the captioned complaint. It is respectfully submitted that in the light of the arbitration clause in the agreement, this hon'ble authority lacks jurisdiction to entertain and adjudicate upon the instant complaint and so the complaint deserves to be dismissed on this ground alone.



20. The respondent submitted that the present complaint is an abuse and misuse of the process of law. The main grievance in

the complaint is that there is delay in delivery of possession. It is submitted that in the present case there is no deliberate or wilful delay in completing the construction and handing over possession of the apartment. 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's agreement. It is submitted that during the prolonged effect of the global recession, the number of bookings made by the prospective purchasers reduced drastically in comparison to the expected bookings anticipated by the respondent at the time of launch of the project. It is submitted that, reduced number of bookings 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 work of the project. Apart from the above the following various problems which are beyond the control of the respondent seriously affected the construction:

- i. Lack of adequate sources of finance.
- ii. Shortage of labour.
- iii. Rising manpower and material costs.



iv. Approvals and procedural difficulties.

21. The respondent submitted that in addition to the aforesaid challenges the following factors also played major role in delaying the offer of possession:

- i. There was extreme shortage of water in the region which affected the construction works.
- ii. There was shortage of bricks due to restrictions imposed by Ministry of Environment and Forest on bricks kiln.
- iii. Unexpected sudden declaration of demonetization policy by the Central Government, affected the construction works of the respondent in a serious way for many months. Non availability of cash-in-hand affected the availability of labourers.
- iv. Recession in economy also resulted in easy availability of labour and raw-materials becoming scarce.
- v. There was shortage of labour due to implementation of social schemes like National Rural Employment Guarantee Act (NREGA) and Jawaharlal Nehru Urban Renewal Mission (JNNURM).



22. The respondent submitted that all the above problems are beyond the control of the respondent and affected the

progress of construction at project site after the project is launched. It is submitted that possession of the apartment could not be handed over to the complainant only because of the reasons explained above, which falls within the purview of clause 7.2 of the agreement. The respondent is entitled for reasonable extension of time for handing over possession of the apartment to the complainant.

23. The respondent submitted that it is an admitted position that the project is under way and not abandoned by the respondent and the money deposited by the complainant has been utilized in the construction activities and ultimately withdrawal from the project will cause unsustainable harm to the other consumers as well.

24. The respondent submitted that the present complaint is liable to be dismissed on the ground of suppression of material facts and documents. A party which fails to do so is not entitled to any relief from a court or a forum. In the above captioned complaint, the complainant had made suppression of many material facts and some of those are:

- i. **Status of the project is suppressed:** The complainant had unabashedly made a blatant attempt to mislead this hon'ble authority by making an averment that the subject



project is nowhere near completion. The respondent submitted that it approached JM Financial Credit Solutions Limited for the term loan of Rs.75 crores to complete the remaining construction of project "Winter Hills 77" and same had been sanctioned by JM financial and out of total sanctioned loan amount Rs.40 crores have been disbursed by JM Financial. It is submitted that subsequently number of contractors have mobilized their resources at project site and construction/development activities at project site have also been commenced with full swing and as on date 850 labourers are working on site. It is submitted that the respondent is committed to complete the construction at the earliest.

- ii. **Complainant has made regular default in making payments:** All payments are to be made by the complainant according to payment plan opted by him which is construction linked payment plan. As on date, the complainant is liable to pay interest amount of Rs.261/- for delay in payment of instalments. It is submitted that above interest shall further increase with further delay in making payment by the complainant.



25. The respondent submitted that as per the apartment buyer's agreement which is an admitted document and legally binding between the complainant and the respondent, the parties have agreed upon their respective liabilities in case of breach of any of the conditions specified therein. It is submitted that the liability of the respondent on account of delay, if any, is specified in the clause 7.9 of the apartment buyer's agreement and as such the complainant cannot claim reliefs which are beyond the compensation agreed upon by him. In this view of the matter, the captioned complaint is not maintainable in law and liable to be dismissed in limine. It is a well settled proposition of the law that the courts cannot generate altogether a new contract; the responsibility of the courts is to interpret appropriately the existing contract and decide the rights and liabilities of the parties within the four corners of the contract. It is submitted that the apartment buyer's 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 this view of the matter, the complaint is not maintainable in law and is liable to be dismissed in limine.



26. The respondent submitted that the dispute between the parties involves complicated questions of facts and law, which

necessarily entails leading of copious evidence. The issues raised by the complainant cannot be addressed in a complaint before this hon'ble authority, which follows a summary procedure. In this view of the matter, the complaint is not maintainable and is liable to be dismissed.

27. The respondent submitted that the total sale consideration of the apartment is Rs.60,58,780/- exclusive of government dues out of which the complainant has paid a sum of Rs.59,71,670/- inclusive of government dues. It is further submitted that the complainant has on many occasions defaulted in making timely payment for the demands raised by the respondent for which he is liable to pay Rs.261/- as interest.

28. The respondent submitted that at present the construction is going on at full swing and shall stand completed latest by June 2019 and apply for the occupancy certificate post which possession of the subject apartment shall be offered to the complainant. It is submitted that the entire construction has been carried out as per the sanctioned building plan which has also been shared from the complainant from the very first stage.

29. The respondent submitted that the contentions raised regarding no construction being undertaken by the



respondent from 2014 to April 2018 are vehemently denied. It is further submitted that at no point of time has the project of the respondent come to a halt and the complainant may be put to strict proof of the same.

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:

30. With respect to the **first issue** raised by the complainant, the authority is of the view that the respondent has delayed the delivery of possession of the booked unit. This is fortified from the fact that as per clause 7.1 of the said agreement dated 27.11.2012, the respondent undertook to complete construction and apply for completion certificate by 31.12.2015 subject to grace period of six months. The relevant clause is reproduced as under:

“7. Possession of the apartment

Notwithstanding the provisions mentioned in the application form in respect of date of possession, the company, subject to force majeure, undertakes to complete the construction and apply for the completion certificate by 31.12.2015, subject to a grace period of 6 (six) months, as and when the completion certificate is received, the possession of the said apartment to the buyer shall be offered, which the buyer has noted and conformed.”



31. Accordingly, the due date of possession comes out to be 30.06.2016 which has already lapsed but the possession has not been delivered till date. The possession has been delayed by 2 years 7 months till the date of decision. 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. Delay charges will accrue from the due date of possession i.e. 30.06.2016 till the handing over of possession.
32. With respect to the **second issue**, the complainant has provided no documents in support of his allegation regarding unlawful gains. Moreover, the respondent can charge only as per the payment plan opted by the complainant i.e. construction linked payment and in line with the agreement duly executed between the parties. Thus, this issue is decided in negative.
33. With respect to the **third issue**, the respondent obtained license no. 67 of 2011 dated 16.07.2011 from the competent authority and the same is renewed till 15.07.2019. Also, the respondent got the building plans approved on 30.01.2012



vide memo no. ZP-739/JD(BS)/2012/1915. However, the respondent has not obtained occupation certificate till date.

34. With respect to **fourth issue**, the respondent has got the project registered with the authority vide registration no. RC/REP/HARERA/GGM/2018/10 dated 25.07.2018 and the same is valid till 31.12.2019.

35. With respect to the **fifth issue** raised by the complainant, as per clause 3.2 of the apartment buyer's agreement dated 27.11.2012, the complainant with wide open eyes has himself agreed to the payment of EDC, IDC, club membership charges, power backup charges, basement car parking charges, etc. to form part of total sale consideration. The complainant cannot raise this issue at such belated stage, thus, this issue is decided in negative.

Findings of the authority

36. 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. 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. 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.

37. An amendment to the complaint was filed by the complainant along with the complaint wherein he has stated that he is not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.
38. The authority is of the considered opinion that it has been held in a catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.



39. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer. This view has been upheld by the Hon'ble Supreme Court in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.
40. The authority has observed that as per clause 7.1 of the apartment buyer's agreement dated 27.11.2012 for unit no.1001, 10th floor, tower-C, in project "Winter Hills 77", Sector-77, Gurugram, possession was to be handed over to the complainant by 31.12.2015 + 6 months grace period which comes out to be 30.6.2016. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.59,71,670/- to the respondent against a total sale consideration of Rs.60,58,780/.
41. Keeping in view the present status of the project and the intervening circumstances, the refund cannot be allowed in the present case, as the respondent has committed to complete



its project by 31.12.2019 as per the HRERA registration certificate. Also, the respondent in his reply is stating that the respondent stands to complete the construction of the project latest by June 2019 and shall offer possession of the subject apartment after receiving the occupation certificate. As the promoter has failed to fulfil his obligation by not handing over the possession within the stipulated time, the promoter is liable under section 18(1) proviso of the Act ibid read with rule 15 of the rules ibid, to pay interest to the complainant, at the prescribed rate, w.e.f. 30.06.2016 till handing over of possession failing which the complainant is entitled to seek refund of the amount.

Decision and directions of the authority

42. After taking into consideration all the material facts adduced 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:

- (i) The respondent is directed to handover possession of the said unit by 31.12.2019 as committed by the respondent in HRERA registration certificate.



- (ii) 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 complainants.
- (iii) The respondent is directed to pay interest accrued from 30.06.2016 to 29.01.2019 on account of delay in handing over of possession to the complainant within 90 days from the date of order.
- (iv) Thereafter, the monthly payment of interest till handing over of the possession so accrued shall be paid on or before 10th of subsequent month.
- (v) The respondent is directed to adjust the payment of delayed possession charges towards dues from the complainant, if any.

43. The order is pronounced.

44. Case file be consigned to the registry.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 29.01.2019

Judgement uploaded on 26.02.2019