

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

**Complaint No.** : 289 of 2018  
**Date of First  
Hearing** : 17.07.2018  
**Date of Decision** : 04.12.2018

Mr. Bajrang Lal Tibrewala

R/o H. No. 1B Ratna Vinay Apartment, Ratna  
Dham Sankul, behind Shardaayan School,  
Piplod, Surat-395007

**Complainant**

Versus

M/s Parsvnath Hessa Developers Pvt. Ltd.,  
Through its Directors  
Registered Office: Parsvnath Metro Tower,  
Near Shahadra Metro Station, Shahadra, Delhi-  
110032

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE:**

Shri Bajrang Lal Tibrewala  
Shri Sukhbir Yadav  
Shri Arpit Dwivedi

Complainant in person  
Advocate for the complainant  
Advocate for the respondents

**ORDER**

1. A complaint dated 18.05.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and



Development) Rules, 2017 by the complainant Mr. Bajrang Lal Tibrewala, against the promoter M/s Parsvnath Hessa Developers Pvt. Ltd., through its directors in respect of apartment/unit described below in the project 'Parsvnath Exotica', on account of violation of the section 3 of the Act ibid.

2. Since, the buyer's agreement has been executed on 27.05.2011 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot 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    | "Parsvnath Exotica",<br>Sector-54, Gurugram                            |
| 2. | Unit no.                            | C4-902, 9 <sup>th</sup> floor, tower -<br>C4                           |
| 3. | Registered/ un registered           | un registered  |
| 4. | DTCP No.                            | 69 to 74 of 1996, 52 to<br>57 of 1997, 1079 of 2006<br>and 191 of 2007 |
| 5. | Nature of real estate project       | Groups Housing   |
| 6. | Total area of the allotted unit no. | 245.72 sq.mtrs (2645   |





|     |   | sq.ft)  |
|-----|---|---|
| 7.  | Payment Plan  | Construction Linked Payment Plan  |
| 8.  | Date of flat buyer agreement  | 27.05.2011  |
| 9.  | Total consideration amount as per final statement of account                      | Rs. 2,21,17,621/-   |
| 10. | Total amount paid by the complainant final statement of account                   | Rs. 2,06,37,779.98/-  |
| 11. | Date of delivery of possession from the date of execution of flat buyer agreement | <p>23.11.2013</p> <p>13.01.2015-(24 months from date of booking, i.e. 23.04.2011 13.07.2012+ 6 months grace period)</p> <p>Clause 10(a)- 36 months from the commencement of construction of the block in which flat is located or 24 months from the date of booking, whichever is later+ 6 months grace period.</p> <p><b>NOTE: Date of construction cannot be ascertained, as no documents has been provided.</b></p> |
| 12. | Delay for number of months/ years upto date 04.12.2018                            | <p><del>3 years 10 months 22</del></p> <p>5 years Approx.</p>   |



Corrected vide order dated 2/2/19.



|     |   | days   |
|-----|---|--|
| 13. | Penalty clause as per flat buyer agreement dated 27.05.2011 | Clause 10(c) of FBA i.e. Rs. 107.60 per sq meter or Rs.10/- per sq.ft. per month for the period of delay |

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A flat buyer agreement dated 27.05.2011 is available on record for the aforementioned apartment according to which the possession of the aforesaid unit was to be delivered on ~~13.01.2015~~ <sup>23.11.2013</sup>. The promoter has neither fulfilled his committed liability by not giving possession as per the terms of the flat buyer agreement. Neither paid any compensation i.e. @ Rs. 107.60 per sq meter or Rs.10/- per sq. ft. per month for the period of delay as per flat buyer agreement dated 27.05.2011 which is in violation of section 11(4)(a) of the Act ibid.



5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance.

*Corrected vide order dated 21/02/19.*

The respondent appeared on 17.07.2018. The case came up for hearing on 17.07.2018, 30.08.2018 and 04.12.2018.

### **Facts of the complaint**

6. Briefly stating the facts of the complaint, are that the promoter and the complainant entered into flat buyer agreement on 27<sup>th</sup> May, 2011 for sale of the flat C4-902 on ninth floor in tower no. C-4 having an approximate 2645 sq.ft. of super built up area consisting of 3 bedrooms, one drawing /dining, one kitchen and 3 toilets, balconies to be built in Parsvnath Exotica, Sector-53, Gurugram
7. As per clause 10(a) of the flat buyer agreement the flat was to be delivered within 36 months of commencement of construction of the particular block-tower C4 in this particular case or 24 months from the date of booking whichever is later. In May 2018, 84 months, almost 7 years have lapsed and the promoter has failed to deliver the flat in accordance with the specifications agreed in as per schedule II the timelines stated in the flat buyer agreement.
8. The complainant submitted that despite, repeated follow ups the promoter is not conveying delivery timelines, timelines for receiving occupancy certificate in the Haryana Real Estate



Regulatory Authority, Gurugram, for tower C4 and when can the flat be registered in complainant's name by paying stamp duty to the Haryana State Government.

9. As per clause 8(b) of flat buyer agreement, if the whole or any part of the project is abandoned and/or the flat agreed to be sold under flat buyer agreement is deleted and no alternative is offered by the promoter and by reasons thereof the promoter is not in a position to give possession of the flat, the complainant will be entitled to refund of the amount paid with simple interest at the rate of 12% per annum till the date of refund.
10. The complainant alleged that the terms and conditions of the agreement are wholly one sided and arbitrary best suited to the respondent.
11. The complainant has been paying EMI's to its home loan lenders since May 2011 and has suffered lot of mental agony, harassment and financial difficulties since the flat purchased under the flat buyer agreement is neither delivered nor is marketable since the project is significantly delayed and nor the promoter has reimbursed the penalty charges calculated at rate of 24% per annum for period of delay which the



promoter proposed to charge from the complainant for delay in payment by the complainant

**12. Issues raised by the complainant**

- I. Whether the respondent has the liability on account of its failure to register the project with Haryana RERA authorities?
- II. Whether there is any reasonable justification for delay to give possession of flat as per the specification set out in the flat buyer agreement?

**13. Relief sought**

- I. Direct the respondent to deliver of flat C4-902, Parsvnath Exotica, Sector-53 Gurugram as per specifications agreed in schedule II of flat buyer agreement immediately with occupancy certificate for tower C4, Parsvnath Exotica from DTCP Haryana with all common facilities and infrastructure (including electricity connection, water supply and other infrastructure available to other towers/blocks in Parsvnath Exotica which have received occupancy certificate from DTCP, Haryana.
- II. Direct the respondent to the promoter to pay the complainant a compensation on the total amount paid



by the complainant to the promoter at the rate of 24% per annum from 27<sup>th</sup> May, 2013.

OR

- III. Direct the respondent to refund entire amount paid by the complainant to the promoter since 26<sup>th</sup> April 2011 plus compensation calculated at the rate of 24% per annum from 26 April, 2011 immediately and cancel the unit allotment in favour of Mr. Bajrang Lal Tibrewala.

**Respondent's reply**

14. The respondent raised preliminary objections upon the maintainability of the complaint is baseless, vexatious and is not tenable in the eyes of the law therefore the complaint deserves to be dismissed at the threshold.
15. The respondent submitted that the project construction is already completed. The competent authority has already granted occupancy certificate for the part of the project and for remaining part is awaiting for getting occupancy certificate. The respondent company under various collaboration agreement/development agreements had planned to develop the project land and in pursuance to the same, 19 towers were planned to be developed. Out of the said 18 towers, 11 were





duly developed and completed and occupancy certificate has been received with respect to these 11 towers on 21.04.2010, 13.03.2011 and 31.10.2011 respectively. The respondent has already applied for occupancy certificate with respect to remaining 5 towers i.e. D4, D5, , D6 on 01.11.2011 and with respect to towers no. B1 and C4 on 13.08.2013 for which review was also filed by the respondent on 24.11.2017 before DTCP.

16. The respondent submitted occupancy certificate is not being granted by DTCP for want of beneficiary interest/right in favour of the developer under the policy dated 18<sup>th</sup> February, 2015.
17. The respondent submitted that the respondent company has applied for registration of the part of the said project with respect to tower no. B5, B6 and EWS with Haryana RERA authority wherein the revised declaration date of handing over the possession of the project is stipulated as 31<sup>st</sup> December 2019 as also confirmed in the RERA registration affidavit cum declaration.
18. The respondent further contended in the reply that due to pendency of the beneficiary interest in favour of the respondent, the delay is being caused in handing over the



possession of the flat. The respondent is pursuing the authority with all its possible efforts to get the formal approval.

19. The complainant have booked the flat for investment purposes only and hence he cannot be treated as a consumer. The respondent submitted that the refund of the money in the present case cannot be considered due to the following reasons:

- (i) Part project has been completed and the respondent are in the process of getting the occupation certificate of tower C-4.
- (ii) The approval regarding the transfer of beneficial interest & marketing rights were framed on 18.02.2015 being under suspension till 31.01.2017 is pending. Hence, grant of refund of the amount is not justifiable.
- (iii) Refund at this advanced stage of the project is not in the interest of the other allottees at large, as the same will hamper the completion of the project.
- (iv) The respondent company being a consumer oriented organization have always put their best endeavour to



completed the project in time despite all the odds being faced by the respondent company which resulted into the fact that out of 18 towers, 11 towers have been duly delivered to the allottees after obtaining the requisite occupancy certificate and the respondent company has offered the possession of the flat for fit out purposes in the remaining 6 towers including the towers no. C4.

20. The respondent submitted that the enforcement of provisions under RERA Act should be prospective and not be retrospective.
21. The respondent submitted that to draw the attention of the hon'ble authority to the mutually agreed clause no. 10(c) of the FBA wherein the delay compensation has been specifically mentioned and agreed by the complainant and hence contending the date of offering the possession as the contention for refund and payment of interest and compensation is incorrect wherein "time is the essence of the contract" stands contravened and hence proviso of section 18 are not applicable in the captioned matter as the respondent have agreed to abide by the obligations made under the flat



buyer agreement duly executed between the complainant and the respondent.

22. The respondent submitted that they faced other various challenges which are beyond their control and which affected the construction, such as lack of adequate sources of finance, shortage of labour, rising manpower and material costs, approvals and procedural difficulties, etc.
23. The respondent further submitted in the reply that the liability of the respondent on account of delay is specified in the clause 10(c) of the agreement and as such the complainant cannot claim relief which are beyond the compensation agreed upon by him. It is well settled proposition of law that the courts cannot travel beyond what is provided in the agreement/contract and generate altogether a new contract.
24. The respondent submitted that the issues raised by the complainant cannot be addressed before the hon'ble authority, which follows a summary procedure. In view of the same, the subject matter cannot be adjudicated without going into the facts of each case which requires elaborate evidence to be led and which cannot be adjudicated upon the summary jurisdiction of the hon'ble authority. The complaint is liable to be dismissed on this ground alone.



### Determination of issues

25. As regards the **first issue** raised by the complainant the project is not registered under RERA. On perusal of records, it is found that the project is not registered under the Real Estate Regulation and Development Act, 2016, the finding of the authority on the issue is that as per proviso to section 3(1) of the Act *ibid*, ongoing project on the date of commencement of this Act have to be registered with the authority. Proviso to section 3(1) of the Act *ibid* which provides as under:-

*"Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:"*

26. Rule 2(1)(o) of the Rules *ibid*, defines ongoing project as a project for which development works are going on and for which no completion/ part occupation certificate has been granted on or before publication of these rules. Rule 2(o) is reproduced as hereunder:

*"on going project" means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:*



(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules and

(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules."

Keeping in view the above facts and as per the records of the authority, the project is registerable under section 3 of the Act ibid and the respondent have not registered the project with the Haryana Real Estate Regulatory Authority as on date. Consequently the above act on their behalf is a punishable offence under section 59(1) of the Act ibid. Section 59(1) provides as under:-

*"If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten per cent. of the estimated cost of the real estate project as determined by the Authority."*



27. In regard to the **second issue** raised by the complainant, the promoters have violated the agreement by not giving the possession on the due date i.e. ~~13.01.2015~~ <sup>23.11.2013</sup> as per the agreement, thus, the authority is of the view that the promoter

*corrected vide order dated 21/02/19.*

has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016.

28. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay to the complainant interest, at the prescribed rate, for every month of delay till the handing over of possession. Section 18(1).

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

*"34 (f) Function of Authority –*

*To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder."*

30. 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 which is reproduced below:

*"37. Powers of Authority to issue directions-*

*The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real*



*estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned."*

### **Findings of the authority**

31. The respondent admitted the fact that the project Parsvnath Exotica is situated in sector-93, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complainant. 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 Arun Kumar Gupta, 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.
32. **Jurisdiction of the authority-** 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. The delay compensation payable by the respondent @ Rs. 107.60 per sq meter or Rs.10/- per sq.ft. per month for the period of delay as per clause 10(c) of the flat buyer 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 as also held in para 181 of **Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

*"...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements."*

34. The complainant by an application for amendment of complaint reserve their right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

35. However, there is a delay in the project as a result of which the possession flat has not been handed over to the complainant. The buyer is entitled for delayed possession charges as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016. On the other side, counsel for the



respondent has stated that they will receive the occupation certificate within a week's time.

36. In case, the respondent failed to deliver the possession of the unit, complainant will be eligible for refund along with the prescribed rate of interest. In between if there is any settlement inter-se the respondent/builder and buyer are at liberty to do so.

#### Decision and directions of the authority

37. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

(i) The respondent is directed to pay interest @ 10.75% p.a. on the paid amount to the complainant from the due date of delivery of possession i.e. ~~13.01.2015~~ <sup>23.11.2013</sup> to 04.12.2018 for the delay occurred in delivery of possession.

(ii) The arrears of interest so accrued @ 10.75% p.a. from the due date of delivery of possession till the order of order on the paid amount of the complainant which comes to be Rs. 86,37,193.63/- shall be paid to the

*Corrected vide order  
dated 21/2/19*



complainant within 90 days from the date of this order.

(iii) Thereafter, the monthly payment of interest i.e. Rs. 184880.11/- till handing over of the possession, so accrues shall be paid before 10<sup>th</sup> of subsequent month.

(iv) If the possession is not given by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. section 19(4) of the Act *ibid*.

38. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered & for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch

39. The complaint is disposed of accordingly.

40. The order is pronounced.

41. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

  
(Samir Kumar)  
Member

  
(Subhash Chander Kush)  
Member

Date: 04.12.2018

Corrected Judgement Uploaded on 01.03.2019



**PROCEEDINGS OF THE DAY**

|                                |  |
|--------------------------------|--|
| Day and Date                   | Tuesday and 04.12.2018   |
| Complaint No.                  | 289/2018 case titled as Mr. Bajrang Lal Tibrewala Vs. M/s Parsvnath Hessa Developers Private Limited |
| Complainant                    | Mr. Bajrang Lal Tibrewala  |
| Represented through            | Complainant in person with Shri Sukhbir Yadav, Advocate.   |
| Respondent                     | M/s Parsvnath Hessa Developers Private Limited   |
| Respondent Represented through | Shri Arpit Dwivedi, Advocate for the respondent.   |
| Last date of hearing           | 13.9.2018  |
| Proceeding Recorded by         | Naresh Kumari & S.L.Chanana  |

**Proceedings**

**Project is not registered with the authority.**

Shri Sukhbir Yadav Advocate appeared on behalf of the respondent and filed power of attorney today.

**Project is not registered with the authority.**

Arguments heard.

A Builder Buyer Agreement inter-se the parties was signed on 27.5.2011 for purchase of a flat No.C4-902, Tower C-4, 9<sup>th</sup> floor, in project Parsvnath Exotica Sector-54, Gurugram. As per clause 10 (a) of the BBA, unit was to be delivered within a period of 36 months from the date of construction of the block in which the flat of the complainant is located or 24

months from the date of booking whichever is later plus 6 months grace period and as such the due date of possession comes out to be **13.1.2015**. However, there is delay in the project as a result of which the possession flat has not been handed over to the complainant. As such, the buyer is entitled for delayed possession charges as per the provisions of Section 18 (1) of the Real Estate (Regulation & Development) Act 2016. On the other side, counsel for the respondent has stated that they shall be getting 'occupation certificate' within a week's time. In case, the respondent failed to deliver the possession of the unit, complainant shall be eligible for refund alongwith the prescribed rate of interest. In between if there is any settlement inter-se the respondent/builder and buyer they are at liberty to do so.

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

Samir Kumar  
(Member)  
4.12.2018

Subhash Chander Kush  
(Member)  
4.12.2018

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

**Complaint No. : 289 of 2018**  
**Date of First  
Hearing : 17.07.2018**  
**Date of Decision : 04.12.2018**

Mr. Bajrang Lal Tibrewala  
R/o H. No. 1B Ratna Vinay Apartment, Ratna  
Dham Sankul, behind Shardayatan School,  
Piplod, Surat-395007

**Complainant**

Versus

M/s Parsvnath Hessa Developers Pvt. Ltd.,  
Through its Directors  
Registered Office: Parsvnath Metro Tower,  
Near Shahadra Metro Station, Shahadra, Delhi-  
110032

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member  
Member**

**APPEARANCE:**

Shri Bajrang Lal Tibrewala  
Shri Sukhbir Yadav  
Shri Arpit Dwivedi

Complainant in person  
Advocate for the complainant  
Advocate for the respondents



**ORDER**

1. A complaint dated 18.05.2018 was filed under section 31 of the Real Estate (Regulation & Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and

Development) Rules, 2017 by the complainant Mr. Bajrang Lal Tibrewala, against the promoter M/s Parsvnath Hessa Developers Pvt. Ltd., through its directors in respect of apartment/unit described below in the project 'Parsvnath Exotica', on account of violation of the section 3 of the Act ibid.

2. Since, the buyer's agreement has been executed on 27.05.2011 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot 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    | "Parsvnath Exotica",<br>Sector-54, Gurugram                            |
| 2. | Unit no.                            | C4-902, 9 <sup>th</sup> floor, tower -<br>C4                           |
| 3. | Registered/ un registered           | un registered  |
| 4. | DTCP No.                            | 69 to 74 of 1996, 52 to<br>57 of 1997, 1079 of 2006<br>and 191 of 2007 |
| 5. | Nature of real estate project       | Groups Housing   |
| 6. | Total area of the allotted unit no. | 245.72 sq.mtrs (2645   |



|     |   |   |
|-----|---|---|
|     |   | sq.ft)  |
| 7.  | Payment Plan  | Construction Linked Payment Plan  |
| 8.  | Date of flat buyer agreement  | 27.05.2011  |
| 9.  | Total consideration amount as per final statement of account                      | Rs. 2,21,17,621/-   |
| 10. | Total amount paid by the complainant final statement of account                   | Rs. 2,06,37,779.98/-  |
| 11. | Date of delivery of possession from the date of execution of flat buyer agreement | 13.01.2015 (24 months from date of booking, i.e. 13.07.2012+ 6 months grace period)<br>Clause 10(a)- 36 months from the commencement of construction of the block in which flat is located or 24 months from the date of booking, whichever is later+ 6 months grace period.<br><b>NOTE: Date of construction cannot be ascertained, as no documents has been provided.</b> |
| 12. | Delay for number of months/ years upto date 04.12.2018                            | 3 years 10 months 22  |





|     |   |  |
|-----|---|--|
|     |   | days   |
| 13. | Penalty clause as per flat buyer agreement dated 27.05.2011 | Clause 10(c) of FBA i.e. Rs. 107.60 per sq meter or Rs.10/- per sq.ft. per month for the period of delay |

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainant and the respondent. A flat buyer agreement dated 27.05.2011 is available on record for the aforementioned apartment according to which the possession of the aforesaid unit was to be delivered on 13.01.2015. The promoter has neither fulfilled his committed liability by not giving possession as per the terms of the flat buyer agreement. Neither paid any compensation i.e. @ Rs. 107.60 per sq meter or Rs.10/- per sq. ft. per month for the period of delay as per flat buyer agreement dated 27.05.2011 which is in violation of section 11(4)(a) of the Act *ibid*.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance.



The respondent appeared on 17.07.2018. The case came up for hearing on 17.07.2018, 30.08.2018 and 04.12.2018.

### Facts of the complaint

6. Briefly stating the facts of the complaint, are that the promoter and the complainant entered into flat buyer agreement on 27<sup>th</sup> May, 2011 for sale of the flat C4-902 on ninth floor in tower no. C-4 having an approximate 2645 sq.ft. of super built up area consisting of 3 bedrooms, one drawing /dining, one kitchen and 3 toilets, balconies to be built in Parsvnath Exotica, Sector-53, Gurugram
7. As per clause 10(a) of the flat buyer agreement the flat was to be delivered within 36 months of commencement of construction of the particular block-tower C4 in this particular case or 24 months from the date of booking whichever is later. In May 2018, 84 months, almost 7 years have lapsed and the promoter has failed to deliver the flat in accordance with the specifications agreed in as per schedule II the timelines stated in the flat buyer agreement.
8. The complainant submitted that despite, repeated follow ups the promoter is not conveying delivery timelines, timelines for receiving occupancy certificate in the Haryana Real Estate



Regulatory Authority, Gurugram, for tower C4 and when can the flat be registered in complainant's name by paying stamp duty to the Haryana State Government.

9. As per clause 8(b) of flat buyer agreement, if the whole or any part of the project is abandoned and/or the flat agreed to be sold under flat buyer agreement is deleted and no alternative is offered by the promoter and by reasons thereof the promoter is not in a position to give possession of the flat, the complainant will be entitled to refund of the amount paid with simple interest at the rate of 12% per annum till the date of refund.
10. The complainant alleged that the terms and conditions of the agreement are wholly one sided and arbitrary best suited to the respondent.
11. The complainant has been paying EMI's to its home loan lenders since May 2011 and has suffered lot of mental agony, harassment and financial difficulties since the flat purchased under the flat buyer agreement is neither delivered nor is marketable since the project is significantly delayed and nor the promoter has reimbursed the penalty charges calculated at rate of 24% per annum for period of delay which the



promoter proposed to charge from the complainant for delay in payment by the complainant

## 12. Issues raised by the complainant

- I. Whether the respondent has the liability on account of its failure to register the project with Haryana RERA authorities?
- II. Whether there is any reasonable justification for delay to give possession of flat as per the specification set out in the flat buyer agreement?

## 13. Relief sought

- I. Direct the respondent to deliver of flat C4-902, Parsvnath Exotica, Sector-53 Gurugram as per specifications agreed in schedule II of flat buyer agreement immediately with occupancy certificate for tower C4, Parsvnath Exotica from DTCP Haryana with all common facilities and infrastructure (including electricity connection, water supply and other infrastructure available to other towers/blocks in Parsvnath Exotica which have received occupancy certificate from DTCP, Haryana.
- II. Direct the respondent to the promoter to pay the complainant a compensation on the total amount paid



by the complainant to the promoter at the rate of 24% per annum from 27<sup>th</sup> May, 2013.

OR

- III. Direct the respondent to refund entire amount paid by the complainant to the promoter since 26<sup>th</sup> April 2011 plus compensation calculated at the rate of 24% per annum from 26 April, 2011 immediately and cancel the unit allotment in favour of Mr. Bajrang Lal Tibrewala.

#### Respondent's reply

14. The respondent raised preliminary objections upon the maintainability of the complaint is baseless, vexatious and is not tenable in the eyes of the law therefore the complaint deserves to be dismissed at the threshold.
15. The respondent submitted that the project construction is already completed. The competent authority has already granted occupancy certificate for the part of the project and for remaining part is awaiting for getting occupancy certificate. The respondent company under various collaboration agreement/development agreements had planned to develop the project land and in pursuance to the same, 19 towers were planned to be developed. Out of the said 18 towers, 11 were



duly developed and completed and occupancy certificate has been received with respect to these 11 towers on 21.04.2010, 13.03.2011 and 31.10.2011 respectively. The respondent has already applied for occupancy certificate with respect to remaining 5 towers i.e. D4, D5, , D6 on 01.11.2011 and with respect to towers no. B1 and C4 on 13.08.2013 for which review was also filed by the respondent on 24.11.2017 before DTCP.

16. The respondent submitted occupancy certificate is not being granted by DTCP for want of beneficiary interest/right in favour of the developer under the policy dated 18<sup>th</sup> February, 2015.

17. The respondent submitted that the respondent company has applied for registration of the part of the said project with respect to tower no. B5, B6 and EWS with Haryana RERA authority wherein the revised declaration date of handing over the possession of the project is stipulated as 31<sup>st</sup> December 2019 as also confirmed in the RERA registration affidavit cum declaration.

18. The respondent further contended in the reply that due to pendency of the beneficiary interest in favour of the respondent, the delay is being caused in handing over the



possession of the flat. The respondent is pursuing the authority with all its possible efforts to get the formal approval.

19. The complainant have booked the flat for investment purposes only and hence he cannot be treated as a consumer. The respondent submitted that the refund of the money in the present case cannot be considered due to the following reasons:

- (i) Part project has been completed and the respondent are in the process of getting the occupation certificate of tower C-4.
- (ii) The approval regarding the transfer of beneficial interest & marketing rights were framed on 18.02.2015 being under suspension till 31.01.2017 is pending. Hence, grant of refund of the amount is not justifiable.
- (iii) Refund at this advanced stage of the project is not in the interest of the other allottees at large, as the same will hamper the completion of the project.
- (iv) The respondent company being a consumer oriented organization have always put their best endeavour to



completed the project in time despite all the odds being faced by the respondent company which resulted into the fact that out of 18 towers, 11 towers have been duly delivered to the allottees after obtaining the requisite occupancy certificate and the respondent company has offered the possession of the flat for fit out purposes in the remaining 6 towers including the towers no. C4.

20. The respondent submitted that the enforcement of provisions under RERA Act should be prospective and not be retrospective.
21. The respondent submitted that to draw the attention of the hon'ble authority to the mutually agreed clause no. 10(c) of the FBA wherein the delay compensation has been specifically mentioned and agreed by the complainant and hence contending the date of offering the possession as the contention for refund and payment of interest and compensation is incorrect wherein "time is the essence of the contract" stands contravened and hence proviso of section 18 are not applicable in the captioned matter as the respondent have agreed to abide by the obligations made under the flat





buyer agreement duly executed between the complainant and the respondent.

22. The respondent submitted that they faced other various challenges which are beyond their control and which affected the construction, such as lack of adequate sources of finance, shortage of labour, rising manpower and material costs, approvals and procedural difficulties, etc.

23. The respondent further submitted in the reply that the liability of the respondent on account of delay is specified in the clause 10(c) of the agreement and as such the complainant cannot claim relief which are beyond the compensation agreed upon by him. It is well settled proposition of law that the courts cannot travel beyond what is provided in the agreement/contract and generate altogether a new contract.

24. The respondent submitted that the issues raised by the complainant cannot be addressed before the hon'ble authority, which follows a summary procedure. In view of the same, the subject matter cannot be adjudicated without going into the facts of each case which requires elaborate evidence to be led and which cannot be adjudicated upon the summary jurisdiction of the hon'ble authority. The complaint is liable to be dismissed on this ground alone.



## Determination of issues

25. As regards the **first issue** raised by the complainant the project is not registered under RERA. On perusal of records, it is found that the project is not registered under the Real Estate Regulation and Development Act, 2016, the finding of the authority on the issue is that as per proviso to section 3(1) of the Act *ibid*, ongoing project on the date of commencement of this Act have to be registered with the authority. Proviso to section 3(1) of the Act *ibid* which provides as under:-

*“Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:”*

26. Rule 2(1)(o) of the Rules *ibid*, defines ongoing project as a project for which development works are going on and for which no completion/ part occupation certificate has been granted on or before publication of these rules. Rule 2(o) is reproduced as hereunder:

*“on going project” means a project for which a license was issued for the development under the Haryana Development and Regulation of Urban Area Act, 1975 on or before the 1st May, 2017 and where development works were yet to be completed on the said date, but does not include:*



*(i) any project for which after completion of development works, an application under Rule 16 of the Haryana Development and Regulation of Urban Area Rules, 1976 or under sub code 4.10 of the Haryana Building Code 2017, as the case may be, is made to the Competent Authority on or before publication of these rules and*

*(ii) that part of any project for which part completion/completion, occupation certificate or part thereof has been granted on or before publication of these rules.”*

Keeping in view the above facts and as per the records of the authority, the project is registerable under section 3 of the Act ibid and the respondent have not registered the project with the Haryana Real Estate Regulatory Authority as on date. Consequently the above act on their behalf is a punishable offence under section 59(1) of the Act ibid. Section 59(1) provides as under:-

*“If any promoter contravenes the provisions of section 3, he shall be liable to a penalty which may extend up to ten per cent. of the estimated cost of the real estate project as determined by the Authority.”*



27. In regard to the **second issue** raised by the complainant, the promoters have violated the agreement by not giving the possession on the due date i.e 13.01.2015 as per the agreement, thus, the authority is of the view that the promoter

has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016.

28. As the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay to the complainant interest, at the prescribed rate, for every month of delay till the handing over of possession. Section 18(1).

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

*“34 (f) Function of Authority –*

*To ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.”*

30. 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 which is reproduced below:

*“37. Powers of Authority to issue directions-*

*The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real*



*estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned."*

### **Findings of the authority**

31. The respondent admitted the fact that the project Parsvnath Exotica is situated in sector-93, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complainant. 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 Arun Kumar Gupta, 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.

32. **Jurisdiction of the authority-** 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. The delay compensation payable by the respondent @ Rs. 107.60 per sq meter or Rs.10/- per sq.ft. per month for the period of delay as per clause 10(c) of the flat buyer 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 as also held in para 181 of **Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)**, wherein the Bombay HC bench held that:

*“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”*

34. The complainant by an application for amendment of complaint reserve their right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

35. However, there is a delay in the project as a result of which the possession flat has not been handed over to the complainant. The buyer is entitled for delayed possession charges as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016. On the other side, counsel for the



respondent has stated that they will receive the occupation certificate within a week's time.

36. In case, the respondent failed to deliver the possession of the unit, complainant will be eligible for refund along with the prescribed rate of interest. In between if there is any settlement inter-se the respondent/builder and buyer are at liberty to do so.

### **Decision and directions of the authority**

37. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- (i) The respondent is directed to pay interest @ 10.75% p.a. on the paid amount to the complainant from the due date of delivery of possession i.e. 13.01.2015 to 04.12.2018 for the delay occurred in delivery of possession.
- (ii) The arrears of interest so accrued @ 10.75% p.a. from the due date of delivery of possession till the order on the paid amount of the complainant which comes to be Rs. 86,37,193.63/- shall be paid to the complainant within 90 days from the date of this order.



- (iii) Thereafter, the monthly payment of interest i.e. Rs. 184880.11/- till handing over of the possession, so accrues shall be paid before 10<sup>th</sup> of subsequent month.
- (iv) If the possession is not given by the respondent then the complainant shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. section 19(4) of the Act *ibid*.

38. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered & for that separate proceeding will be initiated against the respondent u/s 59 of the Act by the registration branch

39. The complaint is disposed of accordingly.

40. The order is pronounced.

41. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.



**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Date: 04.12.2018

Judgement Uploaded on 09.01.2019