

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

Complaint no. : 518 of 2018
First date of hearing: 11.09.2018
Date of decision : 05.12.2018

Mr. Nitin Garg
R/o C 904, Parsvnath Green Ville, Sohna Road, Complainant
Sector 48, Gurugram, Haryana- 122001

Versus

M/s Umang Realtech Pvt Ltd (Through its Respondents
Directors)

1. Wg Cdr J.S. Jarry
2. Manoj Talwar
3. Arun Joshi
4. Gaurav verma

Registered office: B 72, 7th floor, Himalya House
23, Kasturba Gandhi Marg, New Delhi

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Mr. Nitin Garg

Complainant in person

Shri Yash Verma

Advocate for the respondents

ORDER

1. A complaint dated 10.07.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and





Development) Rules, 2017 by the complainant Mr. Nitin Garg, against the promoter M/s Umang Realtech Pvt Ltd. (Through its directors) in respect of apartment no. 1201, tower T, 12th floor in the project 'Monsoon Breeze Phase II', on account of violation of clause 6.1 and 6.2 of apartment buyer's agreement dated 28.02.2014 for not handing over possession on the due date i.e. 28.02.2018 which is an obligation under section 11(4)(a) of the Act *ibid*.

2. Since, the buyer's agreement has been executed on 28.02.2014 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 case are as under: -

1.	Name and location of the project	Monsoon breeze II, Sector 78, Gurugram
2.	Nature of the project	Group housing colony





3.	RERA registered/ not registered.	Registered (116 of 2017)
4.	Date of completion as per registration certificate	30.09.2021
5.	DTCP license no.	77 of 2012 (01.08.2012)
6.	Apartment no.	1201, tower T, 12 floor
7.	Apartment measuring	1300 sq. ft.
8.	Date of booking	06.09.2012
9.	Payment plan	Instalment linked payment plan
10.	Date of execution of apartment buyer's agreement	28.02.2014
11.	Total sale consideration	Rs. 48,06,000/-
12.	Total amount paid by the complainant till date as per the receipts attached with the complaint	Rs. 33,21,631/-
13.	Date of delivery of possession Clause 6.1 and 6.2 i.e. 42 months from the date of approval of buildings plans or signing of agreement whichever is later plus 180 days of grace period	As the date of approval of building plans is nowhere mentioned so the due date of possession will be calculated from the date of agreement: 28.02.2018
14.	Delay of number of years/months	10 months
15.	Penalty clause as per agreement dated 28.02.2014	Clause 6.7 Rs. 5 per sq.ft per month of super area.



4. The details provided above have been checked on the basis of record available in the case file which have been provided by the complainant and the respondents. An apartment buyer's



agreement is executed between the parties on 28.02.2014 for unit no. 1201, 12th floor, tower T details as per which possession of the unit was delivered on 28.02.2018. However, respondent has failed to fulfil its contractual obligation till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. Accordingly, the respondent appeared on 05.12.2018. The case came up for hearing on 05.12.2018. The reply filed on behalf of the respondent on 07.09.2018.

Facts of the case

6. The complainant booked a residential apartment in the project named Monsson Breeze II in Sector 78 Gurugram in the year 2012 with the respondents along with Vidhya Sagar Garg pursuant to aforesaid booking of the complainant, the respondent allotted apartment no. 1201 to the complainant and co- applicant Vidya Sagar Garg. On 28.02.2014 apartment buyer agreement for allotted apartment was executed between the parties.





7. The complainant submitted that as per the agreement the builder agreed to give possession within 42 months. The complainant paid Rs. 35,78,944/- in different instalments to the builder as per his demands. In spite of our repeated follow ups and builder assurances the project could not be completed till today and the project is not even 5% complete. Complainant had already paid almost 75% of the cost of the project. The builder called complainant and informed that respondent is unable to complete this project and when we asked for the refund the builder shows his inability to refund money. As the builder is unable to fulfil the terms of builder buyer agreement for Monsoon Breeze —II, Sector-78, so he requested the builder for refund of paid money along with interest.

8. The complainant submitted that he is not getting response in spite of our repeated requests and mails from the builder regarding the refund for the payment. Hence, he was constrained to file the instant complaint.



Issues to be decided:

- i. Whether the complainant is entitled for refund of Rs.35,

78,944/- along with interest for delayed possession?

Reliefs sought:

The complainant is seeking the following reliefs:

- i. Direct the respondents to refund the amount of Rs. 35, 78,944/-.

Respondent 's Reply

9. The respondents submitted that the present complaint is not maintainable on account of want of cause of action by the complainant and is filed only on experimental basis. The complaint is vexatious, vague and frivolous in nature and it has been filed only to injure the interests and reputation of the respondents and thus the complaint is liable to be dismissed on this ground alone.
10. In the agreement dated 28.02.2014, a specific clause that is clause 3.9 is mentioned which relates to referring of disputes to arbitration, thus both the parties are obligated to refer the dispute for arbitration as the agreement is sacrosanct in such cases, and the authority has no jurisdiction to entertain the present complaint.



11. The respondents submitted that the delay caused for non-delivery of possession to the complainant was due to force majeure conditions as stated clearly in clause 6.4 of the agreement. Thus, the delay caused was not deliberate or willful delay, but it was due to the factors beyond the control of the respondent i.e. lack of adequate sources of finance, shortage of labour, rising manpower and material costs and lastly due to delay in approvals and procedural formalities.
12. The respondents submitted that they were ready to shift the complainant to alternative projects where the work was at finishing stage like "Monsoon breeze ABLM towers" for which OC was applied, "Winter hills 77" or "Winter hills dwarka morh" for which OC had been received but the complainant never accepted for that booking.
13. The respondents submitted that the complainant had been defaulting in making payments and is liable to pay Rs 10,138/- as interest for delay in payment of demands.
14. The respondents submitted that the complainant approached the authority with unclean hands. This is fortified from the fact that the buyers were well aware of their contractual





obligations and he had himself agreed to purchase the said apartment only after carefully understanding each and every clause of the agreement. It was never projected by the respondent that there won't be any eventuality of delay in delivering the possession

15. The respondents submitted that as per clause 6.7 of the agreement the liability of the respondent is stated, and the parties are governed by the clauses of the agreement and not by any other relief. In case of any breach by both the parties, the agreement will be sacrosanct as the present agreement relates to the date prior to the date of coming into force of RERA Act, 2016. Thus, the present complaint is to be dismissed in limine.

16. The respondents submitted that the present complaint cannot be decided summarily as it involves complicated questions of law and facts. Thus, the complaint is liable to be dismissed.

Determination of issue

17. With regard to core issue raised by the complainant, as per clause 6.1 read with 6.2 of the apartment buyer agreement



dated 28.02.2014, possession of the subject apartment was to be delivered within 42 months . Hence the due date of delivery of possession is 28.02.2018. However, the respondent have failed to deliver the possession till date. Keeping in view the dismissal state of affairs the refund should be allowed as the complainant in his pleading has stated that even 5% of the work has not been completed by the respondents and authority find no option to refund the amount deposited by the complainant. Thus, refund of Rs. 35,78,944/- along with prescribed rate of interest should be allowed to the complainant.

18. Accordingly, the due date of possession was 28.02.2018. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the carpet area of the said flat as per clause 6.7 of apartment buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided 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."

19. As the possession of the flat was to be delivered by 28.02.2018 as per the clause referred above, 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, which is reproduced as under:

"11.4 The promoter shall—

- (a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be; Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."*





20. 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.

21. The complainant requested that necessary directions be issued by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation 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

21. The authority has complete subject matter 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. As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

22. Keeping in view the facts and circumstances of the complaint, the authority in view of dismal state of affairs w.r.t. work at the project site and the facts and circumstances of the case, the authority find no option but to order refund the amount deposited by the complainant/buyer along with prescribed



rate of interest i.e. 10.75% per annum within a period of 90 days from this order.

Decision and directions of the authority

23. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues direction to the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest i.e. 10.75% per annum within a period of 90 days from this order.

Date of payment	Principle amount paid	Interest payable @ 10.75% p.a. from the date of payment till order.
1. 06.09.2012	Rs. 10,29,250/-	Rs. 6,91,451/-
2. 01.06.2013	Rs. 39,755/-	Rs. 23,569.54/-
3. 31.03.2014	Rs. 4,87,500/-	Rs. 20,021.81/-
4. 25.02.2015	Rs. 17,65,126/-	Rs. 7,16,895.06/-
5. 06.09.2012	Rs. 2,57,313/-	Rs. 1,72,863.23/-


Corrected vide order dated 21/02/19



Total	Rs. 33,21,631/- 35,78,944/-	Rs. 14,51,937.41/- 16,24,800.64/-
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Corrected vide order dated
21/02/19


(Samir Kumar)
Member


(Subhash Chander Kush)
Member

Dated: 05.12.2018

Corrected Judgment Uploaded on 01.03.2019



HARERA
GURUGRAM



PROCEEDINGS OF THE DAY

Day and Date	Wednesday and 05.12.2018
Complaint No.	518/2018 case titled as Mr. Nitin Garg Vs. M/s Umang Realtech Pvt. Ltd. & Others
Complainant	Mr. Nitin Garg
Represented through	Complainant in person
Respondent	M/s Umang Realtech Pvt. Ltd. & Others
Respondent Represented through	Shri Yash Varma, Advocate for the respondent.
Last date of hearing	11.9.2018
Proceeding Recorded by	Naresh Kumari & S.L.Chanana

Proceedings

Arguments heard.

As per clauses 6.1 and 6.2 of the Apartment Buyer Agreement executed inter- se the parties on 28.2.2014 for unit/flat No.1201, Tower-T, 12th floor, Monsoon Breeze II, Sector-78, Gurugram booked by the complainant, possession was to be delivered within a period of 42 months + 180 days grace period which comes out to be 28.2.2018. Complainant/buyer has already paid an amount of Rs.35,78,944/- to the respondent. However, respondent has failed in fulfilling his obligation as on date, as such, as per section 18 (1) of the Real Estate (Regulation & Development) Act, 2016, complainant is entitled to get the deposited amount paid by him to the respondent.

Keeping in view the dismal state of affairs w.r.t. work at the project site and the facts and circumstances of the case, the authority find no option but to order refund the amount deposited by the complainant/buyer alongwith prescribed rate of interest i.e. 10.75% per annum within a period of 90 days from this order.

Accordingly, the respondent is directed to refund the entire amount paid by the complainant alongwith prescribed rate of interest i.e. 10.75% per annum within a period of 90 days from this order.

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

Samir Kumar
(Member)
5.12.2018

Subhash Chander Kush
(Member)
5.12.2018

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2. Since, the buyer's agreement has been executed on 28.02.2014 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.

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16. The respondents submitted that the present complaint cannot be decided summarily as it involves complicated questions of law and facts. Thus, the complaint is liable to be dismissed.



Determination of issue

17. With regard to core issue raised by the complainant, as per clause 6.1 read with 6.2 of the apartment buyer agreement

dated 28.02.2014, possession of the subject apartment was to be delivered within 42 months . Hence the due date of delivery of possession is 28.02.2018. However, the respondent have failed to deliver the possession till date. Keeping in view the dismissal state of affairs the refund should be allowed as the complainant in his pleading has stated that even 5% of the work has not been completed by the respondents and authority find no option to refund the amount deposited by the complainant. Thus, refund of Rs. 35,78,944/- along with prescribed rate of interest should be allowed to the complainant.

18. Accordingly, the due date of possession was 28.02.2018. The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the carpet area of the said flat as per clause 6.7 of apartment buyer's agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided 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:



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19. As the possession of the flat was to be delivered by 28.02.2018 as per the clause referred above, 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, which is reproduced as under:

“11.4 The promoter shall—

- (a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be:*
Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed.”



20. 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.

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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

21. The authority has complete subject matter 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. As per notification no. 1/92/2017-1TCP dated 14.12.2018 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

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rate of interest i.e. 10.75% per annum within a period of 90 days from this order.

Decision and directions of the authority

23. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues direction to the respondent to refund the entire amount paid by the complainant along with prescribed rate of interest i.e. 10.75% per annum within a period of 90 days from this order.

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4. 25.02.2015	Rs. 17,65,126/-	Rs. 7,16,895.06/-



Total	Rs. 33,21,631/-	Rs. 14,51,937.41/-
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(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Dated: 05.12.2018

Judgement Uploaded on 08.01.2019



HARERA
GURUGRAM

