

**PROCEEDINGS OF THE DAY**

Day and Date	Tuesday and 26.02.2019
Complaint No.	648/2018 case titled as Mr. Ritesh Agrawal Vs M/s Apex Buildwell Pvt. Ltd.
Complainant	Mr. Ritesh Agrawal
Represented through	Shri Ashutosh Kumar Advocate for the complainant
Respondent	M/s Apex Buildwell Pvt. Ltd.
Respondent Represented through	Shri Sandeep Choudhary Advocate for the respondent.
Last date of hearing	22.1.2019
Proceeding Recorded by	Naresh Kumari & S. L. Chanana

**Proceedings**

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

Since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation & Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful.

Arguments heard.

Averments made by the counsel for the respondent shall be adjudged at the time of registering of the project.

Report of Local Commissioner dated 21.01.2019 has been received and placed on record. The relevant portion of LC report is as under:-

**"Since the estimated cost and an expenditure incurred figures are available for the complete project i.e. for tower in Pocket -A and Pocket-B. The overall progress of the project has been assessed on the basis of expenditure and actual work done at site on 16.01.2019. Keeping in view the above facts and figures, it is reported that the work has been completed with respect to financially is 68.12% whereas the work has been completed physical of towers in Pocket-A is about 80% and tower in Pocket-B is 50% approximately. Hence, the overall completion of the project physically is about 62.88%."**

As per averments made by the counsel for the respondent, the project shall be completed within a period of 4 months from the date of renewal of licence by DTCP Haryana. The authority expects that the matter will be expedited for renewal of the licence by the office of DTCP at the earliest. A letter in this regard may be written to DTCP Haryana by registration branch.

A plea has been taken by the counsel for the respondent that the licence could not be renewed, as such, the pace of project has been slowed down. On the previous date of hearing i.e. 22.1.2019, DTP was directed to appear in person, but he has failed to appear before the authority, as such a penalty of Rs.5,000/- is imposed upon DTP on account of non-compliance of directions of the authority.

As per clause 3(a) of the Builder Buyer Agreement dated 26.02.2013 for unit No. 1034 , 10th Floor floor, Tower Lotus in project 'Our Homes', Sector 37-C Gurugram, possession was to be handed over to the complainant within a period of 36 months or from the date of consent to establish i.e. 2.12.2013 + 6 months grace period which comes out to be 2.6.2017. However, the respondent has not delivered the unit in time. It was a

construction linked plan. Complainant has already paid Rs.14,40,000/- to the respondent against a total sale consideration of Rs. 16,00,000/-. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 02.06.2017 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.

The arrears of interest accrued so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10<sup>th</sup> 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)  
26.2.2019

Subhash Chander Kush  
(Member)

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

**Complaint No. : 648 of 2018**  
**First date of hearing: 13.01.2018**  
**Date of Decision : 26.02.2019**

Mr. Ritish Agarwal,  
R/o. 67-4-18 Ashok Nagar, East Godavari  
Andhra Pradesh - 533003

**Complainant**

Versus

M/s Apex Buildwell Pvt. Ltd.  
Regd. Office: 14A/36, WEA,  
Karol Bagh, New Delhi-110005.

**Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Ashutosh Kumar  
Shri Sandeep choudhary

Advocate for the complainant  
Advocate for the respondent

**ORDER**

1. A complaint dated 01.08.2018 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. Ritesh Agrawal against the promoter M/s Apex Buildwell Pvt. Ltd., on account of violation of the clause 3(a) of the apartment buyer's agreement executed on 26.06.2013 in respect of apartment number 1034, 10<sup>th</sup> floor, block/tower 'Lotus' in the project 'Our Homes' for not handing over possession on



the due date i.e. 02.06.2017 which is an obligation under section 11(4)(a) of the Act ibid.

2. Since the buyer agreement dated 26.06.2013 was executed prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for noncompliance of contractual obligation on the part of the respondent in terms of the provision of section 34(f) of the Act ibid.

3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Our Homes", Sector 37-C, Gurugram
2.	RERA registered/ not registered.	<b>Not registered</b>
3.	Nature of the project	Affordable group housing project
4.	DTCP license	13 of 2012
5.	Project area	10.144 arces
6.	Apartment/unit no.	1034 on 10 <sup>th</sup> floor, block/tower 'Lotus'
7.	Apartment measuring	48 sq. mtr. of carpet area
8.	Date of execution of apartment buyer's agreement	26.06.2013
9.	Payment plan	Time linked payment plan
10.	Basic sale price	Rs.16,00,000/-
11.	Total amount paid by the complainant till date	Rs.14,40,000/- (as per statement of account)
12.	Date of delivery of possession as per clause 3(a) of apartment buyer's agreement (36 months + 6 months grace period from the date of commencement of construction	02 <sup>nd</sup> June 2017



	upon receipt of all approvals)	
13.	Consent to establish granted on	02.12.2013(annx R4) (Pg 31 of reply)
14.	Delay in handing over possession till date	1 year 6 months
15.	Penalty clause as per apartment buyer's agreement dated 1.03.2013	Clause 3(c)(iv) of the agreement i.e. Rs.10/- per sq. ft per month of the carpet area of the said flat.

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 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 02.06.2017. Neither the respondent has delivered the possession of the said unit as on date to the purchaser nor they have paid any compensation @ Rs.10/- per sq. ft per month of the carpet area of the said flat for the period of such delay as per clause 3(c)(iv) of apartment buyer's agreement dated 26.06.2013. 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 case came up for hearing on 13.12.2018, 22.01.2019 and 26.02.2019. The reply filed on behalf of the respondent has been perused. The respondent has supplied the details and status of the project along with the reply. The complainant



has filed a rejoinder dated 13.12.2018 wherein he has re-asserted the contentions raised in the complaint.

### Facts of the complaint

6. The complainant submitted that he has applied in affordable housing project under government of Haryana affordable housing scheme and thus allotted apartment no. 1034, 10<sup>th</sup> floor, tower Lotus having a carpet area of approximately 48 sq. meters, vide apartment buyer's agreement dated 26.06.2013. That the basic sale price of the apartment was of Rs.16,00,00.
7. The complainant submitted that as per the apartment buyer's agreement, the respondent had promise the complainant to handover the physical possession of the dwelling apartment /unit within a period of thirty six (36) months, with a grace period of 6 months.
8. The complainant submitted that respondent had cheated and played fraud upon the complainant by booking the apartment in the so called project OUR HOME at village Garauli-Khurd, Sector-37C, Gurugram and thus the respondent has committed criminal offence of breach of trust and other offences.



9. The complainant submitted that several times requested the respondents telephonically as well as personal visits at the office for the delivering the possession of the apartment and met with the officials of respondent in this regard and completed all the requisite formalities as required by the respondent but despite that the officials of respondent's company did not give any satisfactory reply to the complainant and the lingered the on one pretext or the other and refused to deliver the possession of the above said flat.
10. That the respondents by providing false and fabricated advertisement, thereby, concealing true and material facts about the status of project and mandatory regulatory compliances, wrongfully induced the complainant to deposit his hard earned money in their so called upcoming project, with sole dishonest intention to cheat them and cause wrongful loss to them and in this process the respondents gained wrongfully , which is purely a criminal act.
11. The complainant submitted that when he checked the internal wall plaster of allotted unit, its sand is came to his hand and it seems that it was not mixed with the right proportion of cement. As complainant is not from the





construction background and did a very basic test but this plaster material itself shows that the intention of respondent is not on quality but it is just to collect money and spend as low as possible on the construction. It is further submitted that some concerned authority who issued license to the builder (under this Government Affordable Housing Project), should be accountable and have some mechanism to check the basic construction quality at this stage.

12. The complainant submitted that some buyers of this project have filed complaint about this delay in CM window and one of the complainants has been forwarded the complaint to DTP office, sector- 14, Gurugram

**Issues raised by the complainants are as follow:**

- i. Whether the possession of the unit in the said complex is not delivered to the complainant till date?
- ii. Whether the quality of the construction/ building material is low due to which wall plaster sand comes in hand while just touching the walls?
- iii. Whether the respondent is liable to pay the interest @18% for the delayed period?



**13. Relief sought:**

The complainant is seeking the following relief:

- i. To direct the respondent to pay the interest charged by the builder @ 18% p.a. on delayed payment.
- ii. To direct the builder to offer immediate possession of the said flat along with any interest as the hon'ble authority may deemed fit.

**Respondent's reply**

14. The respondent admitted the fact that the project is situated in Sector 37-C, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complainant. The respondent company has contended in its reply that the complainant has sought compensation and the same has to be adjudged by the adjudicating officer under section 71 of the Act and hence the authority does not have jurisdiction to hear the matter. That the complainant does not have any real cause of action to pursue the present complaint and the complainant has filed the present complaint only to harass the respondent builder and gain wrongfully. Further, the respondent has contended that the complainant is estopped from filing the present complaint as the complainant himself defaulted in making payments in timely manner which is *sine qua non* of the performance of the



obligations by the respondent. This default has led multiple problems to the respondent company and extra costs being incurred by the respondent.

15. However, the respondent submitted that the construction of the said project is in full swing. That the respondent company is very much committed to develop the real estate project and as on date the status of construction is as under:

- a) Civil structure : Complete
- b) Internal plaster : Complete
- c) White wash : Under Process
- d) Floorings : Under process 68% complete
- e) Electric fittings : Under process 70% complete

The respondent has scheduled to deliver the possession of the first phase of the project in December 2018 which comprises of 432 flats in 10 towers and complete delivery of 2nd phase by March 2019 comprising of 16 towers having 704 flats.

16. The respondent further admitted that the respondent company is behind schedule of completion, but the respondent is not responsible for the delay as the delay occurred is due to extraneous circumstances beyond their control. Further, the respondent could get the consent to



establish only on 02.12.2013 due to which construction could not be started. That the license bearing no. 13 of 2012 expired on 22.02.2016. However the company filed an application for renewal of license on 11.02.2016 but due to policy issues, the license could not get renewed till date and further due to non-renewal of the license, the application for registration with the HRERA, Panchkula could not be allowed and the application of the respondent was rejected as a result of which the bankers are not allowing smooth finances and the respondent company suffered but the company is not letting such issues come in their way of delivering possession.

17. The respondent submitted that the complete real estate industry is under pressure of delivery and the availability of skilled manpower and material is at its all-time low and thereby, the respondent company does not gain anything by delaying the project and is rather committed to deliver the project in the best standards of quality and performance. The respondent has further contended that the parties are bound by the terms and conditions of the contract and that as per clause 3(a) of the apartment buyer's agreement, the respondent shall handover the possession of the apartment within 36 months with a grace period of 6 months from the date of commencement of construction of the complex upon



the receipt of all project related approvals including sanction of building plan/revised building plan and other approvals.

18. The respondent submitted that clause 3(b) of apartment buyer's agreement enumerates certain situations in which the date of possession shall get extended which states that the completion of the said low cost/affordable group housing project including the apartment is delayed by reason of non-availability of steel and cement or other building materials or water supply or electric power or slow down, strike or lockout or civil commotion or by reason of war or enemy action or terrorist action or earthquake or any act of God or due to circumstance beyond the power and control of the developer.
19. The respondent submitted that though the said project is going behind schedule of delivery, however the respondent have throughout conducted the business in a bona fide manner and the delay occasioned had been beyond the control of the respondent and due to multifarious reasons and given the agreed terms between the parties the complainant have no cause of action to file the present complaint as the delay so occasioned is very much due to the factors so contemplated.



**Determination of issues:**

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issues wise findings of the authority are as under:

20. With respect to the **first issue** raised by the complainant, the authority came across that as per clause 3(a) of apartment buyer's agreement dated 26.06.2013, the possession of the flat was to be handed over within 36 months from the date of commencement of construction (with a grace period of 6 months) upon receipt of all project related approvals. In the present case, the consent to establish was granted to the respondent on 2.12.2013. Therefore, the due date of handing over possession will be computed from 2.12.2013 and date of possession is 02.06.2017. The clause regarding the possession of the said unit is reproduced below:

*"3(a) offer of possession*

*...the Developer proposes to handover the possession of the said flat within a period of thirty-six (36) Months with grace period of 6 Months, from the date of commencement of construction upon receipt of all project related approvals including sanction of building plan/ revised plan and approvals of all concerned authorities including the fire service department , civil aviation department , traffic department , pollution control department etc. as may be required for commencing, carrying on and completing the said complex subject to force majeure, restraints or restriction from any court/authorities...."*

21. With respect to the **second issue**, the complainant has provided no proof but made only assertion with respect to



sub-standard quality of construction in the complaint.  
Therefore, issue is decided negative

22. With respect to the **third issue** raised by the complainant, 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. Section 18(1) is reproduced below:

*“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed in this behalf including compensation in the manner as provided under this Act:*

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

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



23. Accordingly, the due date of possession was 2<sup>nd</sup> June 2017 and the possession has been delayed by one year three months and three days till the date of decision. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. per month of the carpet area of the said apartment as per clause 3(c)(iv) 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."*

24. As the possession of the flat was to be delivered by 02<sup>nd</sup> June 2017 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 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."*

25. 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.*

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**



26. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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.

27. Keeping in view the facts and circumstances of the complaint and submissions made by the parties during arguments, the authority has decided to observed that since the project is not registered, as such, notice under section 59 of the Real Estate (Regulation & Development) Act, 2016, for violation of section 3(1) of the Act be issued to the respondent. Registration branch is directed to do the needful. Averments made by the counsel for the respondent shall be adjudged at the time of registering of the project.

28. Report of Local Commissioner dated 21.01.2019 has been received and placed on record. The relevant portion of LC report is as under:-

“Since the estimated cost and an expenditure incurred figures are available for the complete project i.e. for tower in Pocket -A and Pocket-B. The overall progress of the project has been assessed on the basis of expenditure and actual



work done at site on 16.01.2019. Keeping in view the above facts and figures, it is reported that the work has been completed with respect to financially is 68.12% whereas the work has been completed physical of towers in Pocket-A is about 80% and tower in Pocket-B is 50% approximately. Hence, the overall completion of the project physically is about 62.88%.”

29. As per averments made by the counsel for the respondent, the project shall be completed within a period of 4 months from the date of renewal of licence by DTCP Haryana. The authority expects that the matter will be expedited for renewal of the licence by the office of DTCP at the earliest. A letter in this regard may be written to DTCP Haryana by registration branch.
30. A plea has been taken by the counsel for the respondent that the licence could not be renewed, as such, the pace of project has been slowed down. On the previous date of hearing i.e. 22.1.2019, DTP was directed to appear in person, but he has failed to appear before the authority, as such a penalty of Rs.5,000/- is imposed upon DTP on account of non-compliance of directions of the authority.
31. As per clause 3(a) of the builder buyer agreement dated 26.02.2013 for unit no. 1034, 10th Floor , Tower Lotus in project 'Our Homes', Sector 37-C Gurugram, possession was to be handed over to the complainant within a period of 36



months or from the date of consent to establish i.e. 2.12.2013 + 6 months grace period which comes out to be 2.6.2017. However, the respondent has not delivered the unit in time. It was a construction linked plan. Complainant has already paid Rs.14,40,000/- to the respondent against a total sale consideration of Rs. 16,00,000/-.

### Decision and directions of the authority

29. 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 the following directions to the respondent in the interest of justice and fair play:

- i. The respondent is directed to pay delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 02.06.2017 as per the provisions of section 18 (1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.
- ii. 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 offer of possession shall be paid before 10<sup>th</sup> of subsequent month.



iii. The authority has decided to take suo-moto cognizance against the promoter for not getting the project registered and for that separate proceeding will be initiated against the respondent under section 59 of the Real Estate (Regulation and Development) Act, 2016 by the registration branch.

30. The order is pronounced.

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

**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Dated: 26.02.2019

Judgement uploaded on 11.03.2019

HARERA  
GURUGRAM

