

PROCEEDINGS OF THE DAY

Day and Date	Tuesday and 26.02.2019
Complaint No.	646/2018 Case Titled As Mr. Somnath Deb V/S M/S Apex Buildwell Pvt. Ltd.
Complainant	Mr. Somnath Deb
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 30.1.2014 for unit No.670, 6th floor, tower Daisy, 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 time

linked plan. Complainant has already paid Rs.13,14,608/- 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 2.6.2017 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 10th of subsequent month.

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. : 646 of 2018
First date of hearing: 13.12.2018.
Date of Decision : 26.02.2019.

Mr. Somnath Deb
R/o. A-21, Kendriya Vihar, Sector 56,
Gurugram, Haryana.

Complainant

Versus

M/s. Apex Buildwell Pvt. Ltd.
(Through its Directors – Mr. Arun Kapoor,
Mr. Dwarika Prasad Jaisawal, Mr. Hemant
Sharma and Mr. Manoj Kumar)
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 : Advocate for the complainant.

Shri Sandeep Choudhary : Advocate for the respondent.

ORDER

1. A complaint dated 01.08.2018 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. Somnath Deb, against the promoter, M/s Apex Buildwell Pvt. Ltd.,



through its Directors on account of violation of the clause 3(a) of the apartment buyer's agreement executed on 30.01.2014 in respect of apartment number 670, 6th floor, block/tower daisy in the project 'our homes' for not handing over possession on the due date i.e. 2nd June 2017 which is an obligation under section 11(4)(a) of the Act *ibid*.

2. Since the apartment buyer agreement dated 30.01.2014 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 non-compliance 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.	Nature of real estate project	Group housing project
3.	Total area of the project	10.144 acres.
4.	Apartment/Unit No.	670 on 6 th floor, block/tower daisy
5.	Apartment measuring area	48 sq. mtr. of carpet area
6.	RERA Registered/ unregistered.	Unregistered
7.	Booking date	29.01.2014
8.	Date of execution of apartment	30.01.2014 (Annx A)



	buyer's agreement	
9.	Payment plan	construction linked payment plan (Pg. 52 of the complaint)
10.	Total consideration	Rs.16,00,000/-
11.	Total amount paid by the complainant till date	Rs.13,14,608/-
12.	Percentage of consideration amount	82% approx
13.	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 upon receipt of all approvals)	02.06.2017 [Consent to establish granted on 02.12.2013]
14.	Delay of number of years / months/ days till date	1 year and 8 months approx.
15.	Penalty Clause as per apartment buyer's agreement dated 30.01.2014 i.e. Clause 3(c)(iv)	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 has been provided by the complainant and the respondent. An apartment buyer's agreement dated 30.01.2014 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 subject apartment 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 30.01.2014. Therefore, the promoter has not fulfilled his committed liability till date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent appeared on 13.12.2018. The case came up for hearing on 13.12.2018, 22.01.2019 and 26.02.2019. The reply has been filed by the respondent on 26.09.2018 which has been perused. The respondent has supplied the details and status of the project along with the reply.

Facts of the complaint:-

6. Briefly stated, the facts relevant for the disposal of the present complaint are that on 31.08.2012, the respondent had published an advertisement in daily national newspaper namely times of India for launching of the project namely 'our homes' situated at sector 37-C, Gurugram. Relying on the said advertisement, the complainant had applied in an affordable housing project under government of Haryana affordable housing scheme on 29.1.2014 and was allotted apartment no. 670, 6th floor, tower daisy of the project having a carpet area of 48 sq. mtrs. approx. with an exclusive



right to use of the apartment together with the proportionate undivided, unidentified, impartial interest in the land underneath with the right to use the common areas and facilities in the said housing complex vide apartment buyer's agreement.

7. The complainant stated that he has paid booking amount of Rs.1,64,944/- vide cheque dated 01.02.2014. The apartment buyer's agreement was executed on 30.01.2014 wherein as per clause 3(a), the developer agreed to handover possession of the apartment within 36 months plus 6 months grace period from the commencement of construction upon receipt of all approvals and the respondent failed to develop so called project within the said period. The complainant submitted that he has been visiting the project site and it has been noted that the construction of the project is at the lowest swing and there is no possibility in near future of its completion. Therefore, the respondent company has cheated and frauded the complainant committing criminal offence of breach of trust and other offences.



8. The complainant further submitted that some of the buyers have filed a complaint before CM Window which was forwarded to DTP office. On 15.01.2018, on the request of home buyers, DTP officer on visit to the site came to know that builder license has been expired and not renewed.
9. The complainant alleged that as against the total consideration of Rs. 16,00,000/-, the complainant has made total payment of Rs.13,14,608/- on various dates as per payment schedule. He approached the respondent company time and again, but the respondent company has failed to respond to the complainant's queries nor have delivered the possession of the said unit. Further, the complainant has stated that the quality of the construction done by the promoter is of low quality. The sand of the internal walls plaster came out when the complainant touched it, which shows that the intention of the respondent is only to collect money and spend as low as possible on the construction. Since the respondent has not delivered the possession of the apartment, the complainant has been suffering economic



loss along with other sufferings. Hence, the complainant has filed the present complaint.

Issues raised by the complainant:-

- i. Whether the respondent has delayed in handing over the possession of the unit to the complainant?**
- ii. Whether the quality of construction/building material is of low quality due to which by touching the wall plaster its sand comes in hand?**
- iii. Whether the complainant is entitled to interest for the unreasonable delay in handing over the possession?**

Reliefs sought:-

- i. Interest charged by the builder @ 18% p.a. on delayed payment therefore respondent should pay as per below details-**
 - a) Respondent should pay same interest 18% p.a. which he charged from consumer as per rolling interest @ 18% per annum for delay.**



- ii. **Direct the respondent to handover the possession of the subject apartment with interest by the date committed by the respondent on his affidavit**
- iii. **The complainant is seeking Rs.10,000/- as cost of litigation.**

Respondent's reply:-

10. The respondent admitted the fact that it is developing the project situated at 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.

11. 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.

12. 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.

13. 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:

Civil Structure	:	Complete
Internal Plaster	:	Complete
White Wash	:	Under Process
Floorings	:	Under process 68% complete
Electric fittings	:	Under process 70% complete

14. The respondent submitted that the company 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.



15. The respondent further admits that they are behind schedule of completion, but the respondent is not responsible for the delay as the delay occurred 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.

16. 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.

17. 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.

18. 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.

Rejoinder of the complainant: -

19. The complainant has filed rejoinder to the reply of the respondent denying each and every contentions raised by the respondent in their reply.

Determination of issues:-

20. After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:



21. With respect to **issue no. i and iii** raised by the complainant, as per clause 3(a) of apartment buyer's agreement dated 30.1.2014, 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. Clause 3(a) of the apartment buyer's agreement is reproduced below –

...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....”

22. Accordingly, the due date of possession was 02.06.2017. The delay compensation payable by the respondent @ Rs.10/- per sq. ft. per month of the carpet area



of the said flat 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."

ii. As the possession of the flat was to be delivered by 02.06.2017 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 Haryana Real Estate (Regulation and Development) Act, 2016 and henceforth liable to pay interest at the prescribed rate for every month of delay till the handing over of possession under section 18(1) proviso of the Act *ibid*. The complainant reserves his right to seek compensation from the promoter for which he



shall make separate application to the adjudicating officer, if required.

iii. With respect to **issue no. ii** raised by the complainant, he has failed to adduce any evidence in support to prove that the quality of construction is allegedly of low and sub-standard. Hence, this issue becomes infructuous for the want of documentary evidence in support.

Findings of the authority:-

25. 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.

26. 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.

27. Vide proceedings dated 22.01.2019 local commissioner Shri Suresh Kumar Verma SDO (retired) PWD, B and R, Chandigarh was appointed in order to ascertain the construction status 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%."

28. Arguments heard. Averments made by the counsel for the respondent shall be adjudged at the time of registering of the



project. 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.

29. 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.

30. As per clause 3 (a) of the apartment buyer agreement dated 30.1.2014 for unit no.670, 6th floor, tower daisy, 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.13,14,608/- 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 2.6.2017 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.

Decision and directions of the authority:-

31. 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 duty bound to pay the interest at the prescribed rate i.e. 10.75% for every month of delay as delayed possession charges from the due



date of possession i.e. 02.06.2017 till the actual date of handing over of the possession.

- (ii) The respondent is directed to pay interest accrued from 02.06.2017 to 26.02.2019 on account of delay in handing over of possession which shall be paid to the complainant within 90 days from the date of decision and subsequent interest to be paid by the 10th of every succeeding month.

32. 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.

33. The order is pronounced.

34. Case file be consigned to the registry. A copy of this order be endorsed to the registration branch.



(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram.

Dated: -

Judgement uploaded on 11.03.2019