

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

Complaint no. : 1312 of 2018
First date of hearing : 14.02.2019
Date of decision : 14.02.2019

Mr. Ashok Kumar Madan,
R/o H.no. 119, M.C. Colony,
Hisar-125005, Haryana.

Complainant

Versus

M/s Supertech Ltd.
Address: 1114, 11th floor, Hemkunt
Chamber, 89, Nehru Place,
New Delhi-110019.

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Ms. Tarini Bhargava Advocate for the complainant
Shri Ashok Kumar Madan Complainant in person
Shri Rishabh Gupta Advocate for the respondent

ORDER

1. A complaint dated 25.10.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 by the complainant Mr. Ashok Kumar Madan, against the promoter M/s Supertech Ltd., on account of violation of the clause 34 of the flat buyer's



agreement dated 14.07.2012 in respect of flat described below in the project 'Araville' for not refunding the balance amount even after deducting 15% of total cost of the unit which is an obligation of the promoter under section 11 of the Act *ibid*.

2. Since, the flat buyer's agreement has been executed on 14.07.2012 and cancellation of unit was done by the respondent on 18.02.2015 i.e. prior to the commencement of the Act *ibid*, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under:

1.	Name and location of the project	"Araville", Sector 79, Gurugram, Haryana
2.	Nature of the project	Group housing project
3.	Project area	10.0 acres
4.	DTCP license no.	37 of 2011 dated 26.04.2011
5.	License holder	M/s Tirupati Buildplaza Pvt. Ltd.
6.	RERA Registered/ not registered.	Registered
7.	HRERA registration number	GGM/16/2018
8.	HRERA registration certificate valid up to	31.12.2019
9.	Allotment letter	16.07.2012
10.	Flat/unit no.	R032E00903, 9 th floor



11.	Flat measuring	1530 sq. ft.
12.	Date of execution of flat buyer's agreement-	14.07.2012 [page 24 of complaint]
13.	Payment plan	Construction linked payment plan [page 26 of complaint]
14.	Total sale price of the unit as per the said agreement	Rs.89,97,823/- [Page 26 of complaint]
15.	Total amount paid by the complainant till date as alleged by the complainant.	Rs.39,92,988/-
16.	Cancellation of unit by the respondent on	18.02.2015

4. 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. A flat buyer's agreement dated 14.07.2012 is available on record for the aforesaid unit according to which the possession of the same was to be delivered by 31.05.2015. The respondent has violated clause 34 of the said agreement by not refunding the balance amount even after deducting 15% of total cost of the unit upon cancellation of the booking of the said unit vide letter dated 18.02.2015. Therefore, the promoter has not fulfilled his committed liability as on date.

5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and appearance. The respondent through its counsel appeared on 14.02.2019. The



case came up for hearing on 14.02.2019. The reply filed on behalf of the respondents has been perused.

Facts of the complaint

6. Briefly stated, the facts of the complaint are that the respondent company, M/s Supertech Limited is a company registered under the Companies Act, 1956 and the project in question is known as 'Araville' at Sector 79, Gurugram, Haryana. The project is an ongoing project within Gurugram, Haryana and therefore is within the ambit of this hon'ble regulatory authority. The complainant is unaware about the registration of the said project before this hon'ble authority.
7. The complainant submitted that as per section 2(zk) of the Act ibid, the respondent falls under the category of "promoter" and is bound by the duties and obligations mentioned in the said Act and is within the territorial jurisdiction of this hon'ble regulatory authority.
8. The complainant submitted that he booked a unit bearing no. E/0903 on 9th floor of tower no. E, admeasuring 1530 sq. ft. in the said project, constructed/developed by the respondent company for sale consideration of Rs.89,97,823/-. On 18.05.2012, the complainant transferred Rs.7,00,000/- vide RTGS to the respondent company for which the respondent



company issued a receipt dated 06.06.2012. The flat was booked under construction link plan.

9. The complainant submitted that thereafter the respondent company at its own leisure issued demand notices to the complainant which was forthwith complied by him. The total amount deposited by the complainant to the respondent *inter alia* the advance payment w.r.t. the flat is Rs.39,92,988/-. In June 2014, the complainant visited the site of the unit and was shocked to see that the construction at the site was very slow and the respondent could not handover the possession of the unit (including the grace period) to the complainant as per the terms of the flat buyer's agreement and was in clear violation of the said agreement.

10. The complainant submitted that on 18.10.2014, the respondent company mischievously and with mala fide intent issued a cancellation letter bearing reference no. STC/ARAVILLE/1058499 to the complainant thereby stating an alleged due of Rs.9,47,556/- as unpaid. At the cost of brevity, it is iterated that even though the construction was suspended as well as delayed at the project, the respondent company issued a demand for casting of 8th floor roof slab on 01.08 2014 in clear violation of the terms of the flat buyer's agreement. The respondent further issued another final



demand cum cancellation notice dated 16.01.2015 for the unit threatening the complainant to cancel the allotment as per the terms of the flat buyer's agreement. Soon after, cancellation letter dated 18.02.2015 was again sent to the complainant which was not in consonance with the terms of the flat buyer's agreement.

11. The complainant submitted that his main grievance in the present complaint is that in spite the fact that he has paid 45% of the actual amounts of flat as per the terms of the said agreement, the respondent company had failed to deliver the possession of the flat within the stipulated time.
12. The complainant submitted that having no other option, on 05.05.2015, the complainant sent a legal notice through R. K. Kakkar (Advocate) to the respondent company to refund the amount of Rs.39,92,988/- i.e. the money deposited by the complainant w.r.t. the unit along with interest at 24% p.a. in equity to the letter dated 18.10.2014 and the said agreement. Further, the complainant requested the respondent company to pay Rs.25,00,000/- on account of compensation and mental agony within 30 days of the receipt of the notice.
13. The complainant submitted that another legal notice through Surender Mohan Anand, Advocate was served upon the



respondent thereby informing the company of the unfair trade practice adopted by them and the gross violation of the terms of the said agreement. The notice requests the refund of the complete amount deposited along with interest within 10 days of receipt of the notice along with expenses for the legal notice. The respondent company intentionally to harass the complainant refused to reply to the notice and refund the money.

14. The complainant submitted that that the respondent company evasively responded only to legal notice dated 05.05.2015 denying the grievances of the complainant. The respondent company has intentionally taken the benefit of its own wrong thereby claiming that the complainant shall have to approach the company and the refund will be with 15% deductions from the total cost of the unit.
15. The complainant submitted that on 23.04.2018, his son had written about these unfair trade practices adopted by the respondent to the DTP Authority through email which was subsequently forwarded to the respondent for action within 15 days. However, respondent company denied refunding the money within 15 days.



16. The complainant submitted that the respondent company has failed to complete the construction within the stipulated time, however, the respondent company intends to deduct 15% of the total amount of the unit as cancellation charges. Moreover, the facts and circumstance abovementioned would lead to the only conclusion that there is a deficiency of service on the part of the respondent company and as such they are liable to be punished and penalized.
17. The complainant submitted that the cause of action for the present complaint arose in and around 2013 when the pre-printed flat buyer's agreement containing unfair and unreasonable terms, for the first time, were forced upon the complainant. The cause of action further arose when the respondent company did not handover possession of the unit in November 2014. The cause of action further arose when the complainant lodged his grievances with the respondent company. The cause of action further arose when the respondent company denied to refund of the amount paid within 15 days to DTCP. The cause of action is alive and continuing and will continue to subsist till such time as this hon'ble regulatory authority directs the respondent by an order to refund the money of the complainant. The complainant submitted that he is entitled to get refund of paid



amount along with interest @18% p.a. compoundable from 18.10.2014 to the date of refund.

Issues to be decided

18. The complainant has raised the following issues:
- Whether the developer has violated the terms and conditions of the flat buyer's agreement?
 - Whether the complainant is entitled for refund along with interest of all the money paid to the respondent?
 - Whether there is any deliberate or otherwise, misrepresentation on the part of the developer for delaying the refund of paid amount after the cancellation of the allotment?

19. Reliefs sought:

The complainant is seeking refund the paid amount i.e. Rs.39,92,988/- with interest at prescribed from 18.10.2014 to the date of refund on paid amount by the complainant to the respondent.

Reply on behalf of respondent

20. The respondent submitted that the complaint filed by the complainant is not maintainable in the present form and is filed on false and frivolous grounds. The complainant has not



come with clean hands before this hon'ble forum and has suppressed the true and material facts from this hon'ble forum.

21. The respondent submitted that the project 'Araville' is registered before this hon'ble authority. The registration no. is 16 of 2018 dated 13.10.2018 which is valid up to December 2019.

22. The respondent submitted that the possession of the said unit is proposed to be delivered by the respondent to the allottee by November 2014 with an extended grace period of 6 months as agreed by the parties to the agreement which comes out to May 2015. The completion of the building has been delayed by reason of non-availability of steel and/or cement or other building materials and/or water supply or electric power, etc. which is beyond the control of respondent and if non-delivery of possession is as a result of any act aforementioned, the respondent shall be entitled to a reasonable extension of time for delivery of possession of the said premise as per the terms of the said agreement. There is no malafide intention of the respondent to get the delivery of the project delayed. Due to the orders passed by the environment pollution (Prevention and Control) Authority, the construction was/has been stopped for few days due to high rise in pollution in Delhi NCR.



Thus, the one of the reasons behind delayed possession of the projects in the real sector market is the said orders.

23. The respondent has further submitted that due to stagnation, sluggishness, down fall in real estate market, demonetisation as well as coming into force of GST, the speed of work/construction of every real estate market has been too slump which results in delay in delivery of possession as well as financial loss to the promoters. The plea of allottees in all the complaints for refund is not tenable in the eyes of law. Thus, due to insufficient monetary fund as well as huge down fall in the real estate market, all the allottees have planned to seek refund of the invested money and let the promoter suffer for all aforesaid circumstances.

24. The respondent submitted that the enactment of the Act ibid is to provide housing facilities with modern development infrastructure and amenities to the allottees and to protect the interest of allottees in the real sector market but not to spoil the development of project by refunding the amount claimed by the allottees. Thus, the plea/relief of refund claimed by every allottee is not sustainable in the eye of law rather is a preplanned to get refund their money to get safe from breach of contract in future for making further installments, by filing such frivolous complaints.



25. The respondent has submitted that said project is a continuance business of the respondent and it will be completed by the year December 2019. The current status of the tower- E is that it is completed. The respondent also undertakes to give possession of tower E by the year December 2019. No refund at this stage can be made to the complainant when tower is completed/developed.

26. The respondent submitted that the complaint filed by the complainant is barred by limitation. It is also pertinent to mention here that the respondent issued demand letter dated 01.08.2014 of Rs.9,47,556/-. The complainant has never paid heed to this demand notice, after a long wait for the complainant, the respondent cancelled the unit. The respondent finally cancelled the unit in Feb 2015 and the limitation to challenge the said cancellation is three years. Thus, the period of three years has been lapsed, so the complaint is not maintainable as barred by limitation. This act, conduct of the complainant elucidates that he has no sufficient funds to pay the installments and to get safe to pay further installments and has intentionally not paid heed to the demand raised by the respondent. The respondent submitted that in the present case, the complainant himself is in default who failed to pay the installments raised by the complainant



and due to violation of terms of the agreement done him, the respondent cancelled the unit.

Determination of issues

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

27. With respect to the **first and second issues** raised by the complainant, from the perusal of record it is found that the respondent has issued notice for cancellation of the allotment of unit in question on 18.02.2015. But with the said notice the respondent has not refunded even a single penny to the complainant in terms of clause 34 of the flat buyer's agreement dated 14.07.2012. The relevant clause is reproduced as under:

“34. That 15% of the total cost of the unit shall constitute the Earnest Money which shall be forfeited in case of non-fulfilment of the terms of allotment/cancellation and shall not be refunded in any case whatsoever...”

28. Hence, the respondent has violated the abovementioned clause which is in violation of section 11 of the Act *ibid*. However, as per settled proposition of law in the case of **DLF v. Bhagwati Narula (revision petition no. 3860 of 2014 decided on 6.01.2018)**, the builder cannot forfeit earnest money of more than 10% of total consideration. Thus, the complainant is entitled to refund of the amount paid after



deduction of the 10% of the total sale consideration along with interest @ 10.75% p.a.

29. With respect to the **third issue** raised by the complainant, the complainant has not provided any document to prove the misrepresentation on part of the complainant. Therefore, this issue is decided in negative.

Findings of the authority

30. The authority has complete jurisdiction to decide the complaint in regard to non-compliance of obligations by the promoter as held in *Simmi Sikka V/s M/s EMAAR MGF Land Ltd.* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District. In the present case, the project in question is situated within the planning area of Gurugram district, therefore this authority has complete territorial jurisdiction to deal with the present complaint.



31. An amendment to the complaint was filed by the complainant along with the complaint wherein he has stated that he is not appearing before the authority for compensation but for fulfilment of the obligations by the promoter as per provisions of the said Act and reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.
32. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter. 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 *ibid*.
33. By virtue of this complaint, the complainant is seeking refund of the deposited by willing surrendering 15% of the BSP as the respondent has failed to deliver the booked unit in time which was to be delivered by 31.05.2015 as per agreement dated 14.07.2012 executed inter se parties. Moreover, the respondent has cancelled the booked unit on 18.02.2015 but as per clause 34 of the said agreement, respondent was duty bound to refund the balance amount by deducting 15% of BSP. Further, countering the contentions raised by the complainant, counsel for the respondent raised the question of limitation and the period of limitation is three years which has



already lapsed and the complaint is not maintainable before this authority.

34. Since, the respondent has failed to deliver the booked unit to the complainant in time and to refund the balance amount even after deducting the agreed amount till date, as such, the vires of the complaint w.r.t the limitation is scuttled by the respondent and it is not covered under law of limitation as cause of action is still alive and subsisting. The language used by the respondent is quite pitiable and one sided as a result of which no cognizable meaning can be extracted in any manner.
35. As per the settled preposition of law in the case of **DLF v. Bhagwati Narula (revision petition no. 3860 of 2014 decided on 6.01.2018)**, the builder cannot forfeit earnest money of more than 10% of total consideration.

Decision and directions of the authority

36. After taking into consideration all the material facts adduced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby directs the respondent to cancel the allotment and forfeit earnest money i.e. 10% of the BSP and refund the balance amount along with prescribed



interest @ 10.75 % per annum to the complainant within 90 days from the date this order.

37. The order is pronounced.

38. Case file be consigned to the registry.

(Samir Kumar)

Member

(Subhash Chander Kush)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.02.2019

Judgement uploaded on 13.03.2019



HARERA
GURUGRAM

