

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

Complaint no. : 1514 of 2018
First date of hearing : 14.03.2019
Date of decision : 14.03.2019

M/s Amba Aircon Pvt. Ltd. (Through Authorized
Representative: Mr. Sharad Kumar Saxena)
Regd. office: L-11/19, DLF City, Phase-II,
Gurugram, Haryana

Complainant

Versus

M/s Sana Realtors Pvt. Ltd.
Regd. office: 12/15, East Patel Nagar,
New Delhi

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Shri Sanjeev Sharma
None for respondent

Advocate for the complainant
advocate for the respondent

ORDER

1. A complaint dated 30.10.2018 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 M/s Amba Aircon Pvt. Ltd. (Through Authorized Representative: Mr. Sharad Kumar Saxena), against the promoter M/s Sana Realtors Pvt. Ltd., on account of violation of the clause 15 of



flat buyer's agreement executed on 12.05.2010 in respect of unit described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. The complaint was filed on 30.10.2018. Notices w. r. t. hearing of the case were issued to the respondent on 30.10.2018, 22.11.2018 and 21.12.2018 for making his appearance. However, despite due and proper service of notices, the respondent did not appear before the authority despite giving it due opportunities as stated above. From the conduct of the respondent it appears that it does not want to pursue the matter before the authority by way of making appearance, adducing and producing any material particulars in the matter. As such the authority has no option but to declare the proceedings *ex-parte* and decide the matter on merits by taking into account legal/factual propositions as raised by the complainant in its complaint.



3. Since, the flat buyer's agreement has been executed on 12.05.2010 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 the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

4. The particulars of the complaint are as under: -

1.	Name and location of the project	“Precision SOHO Tower”, Sector 67, Gurugram, Haryana.
2.	Nature of the project	Commercial colony
3.	Project area	2.456 acres
4.	Registered/not registered	Not registered
5.	DTCP license no.	72 of 2009 dated 26.11.2009
6.	License holder	M/s Sana Realtors Pvt. Ltd.
7.	Date of execution of flat buyer agreement	12.05.2010
8.	Office space/unit no. as per the said agreement	54, ground floor
9.	Unit measuring as per the said agreement	759 sq. ft.
10.	Payment plan	Construction linked payment plan
11.	Total consideration amount	Rs.57,18,415/-
12.	Total amount paid by the complainant till date	Rs.48,17,652/-/-



13.	Date of delivery of possession as per clause 15 of flat buyer agreement i.e. 3 years from the date of execution of buyer agreement i.e. 12.05.2010	12.05.2013
14.	Delay in handing over possession from due date of possession till date of offer of possession	4 years 10 months and 2 days
15.	Penalty clause as per flat buyer agreement	Not given in the agreement

5. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant. A flat buyer's agreement dated 12.05.2010 is available on record for the aforesaid unit. As per clause 15 of the flat buyer's agreement dated 12.05.2010, the due date of handing over possession was 12.05.2013. The respondent has neither deliver the possession of the said unit nor paid any interest for the period he delayed in handing over the possession. Therefore, the promoter has not fulfilled their committed liability as on date.

Brief facts

6. The complainant submitted that respondent company M/s Sana Realtors Pvt Ltd. being the lawful owner in possession of land bearing Killa no. 139/5, 139/6, 140/2 situated in the revenue estate of Badshahpur, Tehsil and District, Gurgaon



were granted licence bearing no. 72 of 2009 by the Director, Town and Country Planning, Haryana for construction and development of a commercial colony over the aforesaid land and upon which the respondent company floated its project namely "**PRECISION SOHO TOWER**" herein after referred to as the project.

7. The complainant submitted that the complainant purchased a shop / office / unit no 54 admeasuring a super area of 759 sq. ft situated on the ground floor on the assurance that construction shall be complete in time and possession would be handed over in time.
8. The complainant submitted that flat buyer's agreement dated 12.05.2010 was signed between both the parties i.e. the respondent and the complainant on the terms and conditions as laid down by the company as per which agreement shop / office / unit no 54 admeasuring a super area of 759 sq. ft situated on the ground floor was sold to the complainant for a total sale consideration of Rs. 51, 39, 478/- as also the complainant at the time of execution of the agreement paid a sum of Rs. 4,33,540/- to the respondent, of which amount the



respondent had taken Rs. 2,50,000/- toward one car parking space.

9. The complainant submitted that it is pertinent to mention here that as per the flat buyer agreement the possession of the unit in question was to be handed over within 36 months from the date of the said agreement as provided under clause 15 of the agreement i.e. possession of the unit in question was to be handed over lastly by May 2013.
10. The complainant submitted that the complainant after an exorbitant delay of almost 5 years received letter dated 27.07.2017, in which the respondent admitted that the unit in question is still not ready, which is also evident from the fact that the construction work was still undergoing and demanded Rs. 9,87,817/- from the complainant being the pending balance toward the total sale consideration. Though the respondent offered the possession of the unit in question after a delay of almost 5 years, however no interest for the delayed period was offered by the respondent to the complainant and aggrieved of which the complainant visited the office of the respondent with the request to pay interest



for the delayed possession but the same were in vain. That till date the complainant has made the payment of Rs. 48,17,652/- to the respondent.

11. The complainant submitted that being aggrieved of the fact that the respondent caused exorbitant delay in handing over the possession of the unit in question to the complainant by almost 6 years and now not offering any interest for the delayed possession, the complainant has approached this hon'ble authority.

Issue to be decided

- i. Whether the promoter is liable to get itself registered with this hon'ble authority under the RERA Act, 2016?
- ii. Whether the section 2 (o) of the Haryana Real Estate (Regulation and Development) Rules, 2017 is in direct contradiction of the Section 3 of the RERA Act, 2016 and if that so whether the provision of the Act would prevail over the Rules and Regulations made there under?
- iii. Whether the respondent has caused exorbitant delay in handing over the possession of the units to the complainant and for which the respondent is liable to



pay interest @ 18 % P.A (i.e. at the same rate of interest which the respondent use to charge on delay in payments by the Allottees) to the complainant on amount received by the respondent from the complainant and which interest should be paid on the amount from the date when the respondent received the said amount?

- iv. Whether open parking space and parking in common basements be sold to the allottees as separate unit by the promoter, which the respondent has sold as separate unit at a cost of Rs. 2,50,000/- and if not than the amount so collected be returned back to the allottees from whom charged?
- v. Whether the respondent can legally sell super area instead of carpet area?
- vi. Whether the respondent is liable to refund the monies so collected by it from the complainant toward the goods and service tax which came on statute and implemented from 1st of July 2017 as the said tax became payable only due to delay in handing over the possession by the



respondent, as if the possession was given by the respondent on time then the question of GST would never have arose?

vii. Whether actions should be taken against the respondent for their failure of not obtaining insurances as prescribed under section 16 of the act?

viii. Whether possession of the common area alongwith interest free maintenance security received by the respondent be handed over to the registered association of allottees through registered conveyance deed required as per the act and that the respondent should not install any moveable or immoveable structures in the common areas for gain and any gain if so received from the moveable or immoveable structures so installed in the common areas be transferred to registered association of allottees?



Relief sought by the complainant

i. That the respondent/ promoter be ordered to make refund of the excess amount collected on account of any

area in excess of carpet area as the respondent has sold the super area to the complainant which also includes the common areas and which sale of common area is in total contradiction of the act, for the reason as per the act the monetary consideration can only be for the carpet area.

- ii. The respondent/promoter be ordered to make payment of interest accrued on amount collected by the respondent from the complainant, account of delayed offer for possession and which interest should be @18% P.A from the date as and when the amount was received by the respondent from the complainant.
- iii. Direct the respondent to refund the amount of GST service tax etc if collected from the complainant, which had to be paid by the complainant only for the reason of delayed offer of possession, as, if the offer of possession was given on time, then no question of GST service tax would have arise as on such date GST service tax was not in existence.



- iv. Any common area car parking including basement car park, which is not garage if sold than the money collected on such account shall be refunded along with interest.
- v. That this hon'ble authority may direct the respondent to pay litigation cost @ Rs. 50,000/- to the complainant.
- vi. That orders may be passed against the respondent in terms of Section 59 of the RERA Act, 2016 for the failure on part of the respondent to register itself with this hon'ble authority under the RERA Act, 2016.

Determination of issues

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

12. With respect to **first and second issue** raised by the complainant, as the project is registerable and has not been registered by the promoter thereby violating section 3(1) of the Act, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent.



And as far as the conflict between section 2 (o) of the Haryana Real Estate (Regulation and Development) Rules, 2017 and section 3 of the RERA Act, 2016 the same has already been dealt in the case of ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.***

13. With respect to the **third issue**, as per clause 15 of the flat buyer's agreement, the possession of the said unit was to be handed over within 3 years from the date of this agreement i.e. 12.05.2010. Therefore, the due date shall be computed from 12.05.2010. The relevant clause is reproduced as under:

"15. That the possession of the said premises is proposed to be delivered by the developer to the allottee within 3 years from the date of this agreement."

14. Therefore, the due date of possession comes out to be 12.05.2013 and the possession has been delayed by **4 years, 10 months and 2 days** till the date of decision. Since the project is badly delayed i.e. against the committed date of delivery of possession 12.05.2013. As per averments made by the counsel for the complainant that there is no progress w.r.t. construction of work. Since there is no hope and scope



for completion of project, no choice is left with the authority but to direct the respondent to refund the entire amount deposited by the complainant with prescribed rate of interest i.e. 10.75% per annum

15. With respect to **fourth issue** raised by the complainant, the authority is of the opinion that open parking spaces cannot be sold/ charged by the promoter. As far as issue regarding parking in common basement is concerned, the matter is to be dealt as per the provisions of the flat buyer agreement where the said agreement have been entered into before coming into force the Real Estate (Regulation and Development) Act, 2016. As per clause 2 of the agreement, the respondent reserved absolute right to deal with basement parking area.

16. With respect to **fifth issue** raised by the complainant, as per RERA, 2016, the builder shall disclose the carpet area and super area and as per the specimen agreement annexed in the said Act, the sale has to be executed on the basis of carpet area. However, the flat buyer's agreement in question was executed on 14.05.2010, much prior to coming into force of



the said Act and the complainant purchased the unit in question on the basis of super area with wide open eyes. Thus, this issue becomes infructuous as the said Act cannot be applied to retrospective transactions.

17. With respect to **sixth issue** raised by the complainant, the complainant shall be at liberty to approach any other suitable forum regarding levy of GST.
18. With respect to **seventh issue** raised by the complainant, the agreement in question was executed on 12.05.2010, prior to coming in force of the said Act. Thus, section 16 of the Act does not apply to retrospective transactions.
19. With respect to **eight issue** raised by the complainant, as per clause 28 of the agreement in question, it has been mutually agreed that the possession of the common areas shall remain with the developer who shall be responsible to maintain and upkeep the same during construction stage and till the same is handed over to association of apartment owners. Further, as per section 11(4)(d) and 11(4)(e) of the RERA, 2016, the promoter shall be responsible for providing and maintaining essential services, on reasonable charges, till the taking over



of maintenance of the project by the association of allottees and the promoter shall enable the formation and association or society or cooperative society. However, the complainant has failed to furnish any documentary proof in order to establish the existence of any registered association of allottees or whether the possession of common areas has been handed over to any such association by the respondent.

Findings of the authority

20. 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.

21. 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.

22. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter.

23. 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 of the Act and to fulfil its obligations.

24. Complaint was filed on 30.10.2018. Notices w.r.t. reply to the complaint were issued to the respondent on 30.10.2018, 22.11.2018 and 21.12.2018. However, despite due and proper service of notices, the respondent neither filed the reply nor appear before the authority. From the above stated conduct of the respondent, it appears that respondent does not want to pursue the matter before the authority by way of making personal appearance by adducing and producing any material particulars in the matter. As such, the authority has no option but to proceed ex-parte against the respondent and to decide the matter on merits by taking into a count



legal/factual propositions, as raised, by the complainant in his complaint.

25. A final notice dated 27.02.2019 by way of email was sent to both the parties to appear before the authority on 14.03.2019.

26. As per clause 15 of the flat buyer's agreement dated 12.5.2010 for unit no.54, ground floor, in project "Precision SOHO", tower sector - 67, Gurugram, possession was to be handed over to the complainant within a period of 36 months which comes out to be 12.5.2013. However, the respondent has not delivered the unit in time. Complainant has already paid Rs.48,17,652/- to the respondent against a total sale consideration of Rs.57,18,415/-.

27. It is matter of record that despite affecting of three services, respondent has not replied as a result of which the case has been declared for ex-parte proceedings. Since the project is badly delayed i.e. against the committed date of delivery of possession 12.5.2013. it is delayed by 4 years 10 months 2 days.



28. As per averments made by the counsel for the complainant that there is no progress w.r.t. construction of work. Since there is no hope and scope for completion of project, no choice is left with the authority but to direct the respondent to refund the entire amount deposited by the complainant with prescribed rate of interest i.e. 10.75% per annum

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 refund the entire amount deposited by the complainant with prescribed rate of interest i.e. 10.75% per annum within a period of 90 days from the date of this order.
- ii. As the project is registerable and has not been registered by the promoter thereby violating section 3(1) of the Act, the authority has decided to take suo-moto



cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent. A copy of this order be endorsed to registration branch for further action in the matter

30. The order is pronounced.

31. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 14.03.2019

Judgement uploaded on 18.04.2019

HARERA
GURUGRAM

