

**BEFORE RAJENDER KUMAR, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM**

Complaint no. : 4645 of 2020

Date of decision : 11.10.2021

PRAVAL AGARWAL AND
VERSHA AGARWAL
R/O : Flat No. – 9/291,
Laxmi Oil Mills,
Kanwari Ganj,
Delhi Gate, Aligarh-202001

Complainants

Versus

ASHIANA DWELLINGS PVT. LTD.
ADDRESS: 5F, Everest 46/C,
Chowrinhgee Road, Kolkata,
W.B.- 700071

Respondent

APPEARANCE:

For Complainants:

Mr. Sukhbir Yadav (Advocate)

For Respondent:

Mr. S. M. Ansari (Advocate)

11/10/21
A.O.
11/10/21

ORDER

1. This is a complaint filed by Praval Agarwal and Versha Agarwal (also called as buyers) under section 31 of The Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of The Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) against respondent/developer.
2. As per complainant, they booked a flat in respondent's project "**Ashiana Mullberry**", situated at sector-2, Sohna Road, Gurugram on 30.04.2016, under subvention payment scheme and made payment of Rs 5,00,000 as booking amount. The respondent issued a provisional allotment letter dated 16.05.2016 and allotted unit No. C- 416 in Tower T 4 admeasuring 1210 sq. ft. for a total consideration of Rs 64,20,250, 'including BSP, EDC, IDC with taxes etc. A builder buyer agreement (BBA) was executed on 16.05.2016. The respondent changed the unit and allotted a new unit No. B-305 in Tower T 2 admeasuring 1465 sq. ft. under construction linked plan for a total consideration of Rs 67,68,967 and accordingly issued a supplementary agreement dated 18.10.2019 for the new unit.
3. As per the Clause 11.2 of buyer's agreement, the possession of the unit was proposed to be delivered within 39 months from the date of execution of buyer's agreement or start of



construction after the grant of Environmental Clearance by MOEF whichever is later, with 6 months of grace period. The respondent failed to complete the construction work and consequently failed to deliver the possession of the unit till date.

4. The complainants have availed housing loan of Rs 52,00,000 from HDFC Ltd and the parties executed tripartite agreement dated 14.06.2016 under subvention scheme. In pursuance of the change of unit, the respondent issued a confirmation letter dated 25.11.2019 to HDFC Ltd with respect to new unit no. B - 505 under construction linked payment plan.
5. The complainants have paid all dues as demanded by the respondent from time to time. When they enquired about the progress of the construction, the respondent failed to provide any clear date of completion of the project. They (complainants) visited the project site on 06.11.2020, and found that the construction work of the tower in which their unit is situated, is far from completion. The respondent has failed to obtain the occupation certificate. They (complainants) have paid Rs 59,43,806 i.e. 87 % of entire agreed consideration along with miscellaneous and additional charges etc, on time.

Handwritten signature
A. P.
11/10/21

6. As per the details available on website of MCA/ROC, there were two directors of the company namely Rohit Raj Modi and Mayank Raj Modi, and after resignation of both of said directors, there is no active director in the company, which is violation of the statutory requirement.
7. As respondent has committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of the unit in question, the complainants have prayed for refund of entire amount of Rs 59,43,806, along with interest at prescribed rate.
8. The particulars of the project are reproduced here as under in tabular form:

S.No.	Heads	Information
PROJECT DETAILS		
1.	Project name and location	" Ashiana Mullbery ", Sector 2, Sohna, Gurugram, Haryana
2.	Project area	10.25 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	16 of 2014 dated 10.06.2014 valid upto 09.06.2019
5.	RERA Registered/ not registered	Registered vide no. 44 of 2017 dated 11.08.2017

UNIT DETAILS

1.	Unit No. (old unit)	C- 416
2.	Unit No. (new unit)	B - 505
3.	Unit measuring (old unit)	1210 sq. ft.
4.	Unit measuring (new unit)	1465 sq. ft.
5.	Date of Booking	30.04.2016
6.	Date of Allotment Letter (old unit)	16.05.2016
7.	Date of Buyer's Agreement (old unit)	16.05.2016
8.	Date of Supplementary Agreement	18.10.2019
9.	Due Date of Delivery of Possession Clause 11.2 of buyer's agreement: the possession of the unit was proposed to be delivered within 39 months from the date of execution of buyer's agreement or start of construction after the grant of Environmental Clearance by MOEF whichever is later with 6 months grace period.	16.08.2019



A.O.

11/10-21

10.	Delay in handing over of possession till date	2 year 02 months
PAYMENT DETAILS		
11.	Total sale consideration	Rs 67,68,967
12.	Amount paid by the complainant	Rs 59,43,806
13.	Payment Plan	Construction linked payment plan

9. The respondent contested the complaint by filing a reply dated 15.02.2021. It is averred that complainants vide letter dated 22.08.2019 requested for change of unit and as per their request the unit was changed from C-416 (Tower T 4) to B-305 (Tower T 2) . On 14.06.2016, permission to mortgage was issued by respondent and the same was issued again after change of unit, on 10.10.2019 to HDFC Ltd. A tripartite agreement dated 18.10.2019 was executed among complainants , respondent and HDFC.

10. It is contended that complainants failed to make payment as per the payment plan opted by them and have made several defaults in the payment of instalments towards the subject unit. the possession of unit was to be delivered within 39 months with grace period of 6 months subject to timely payment by the allottee as well as force majeure

Sub
A.O.
11-10-21

circumstances. The construction work was stopped several times during the year 2016, 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and Supreme Court. Due to increase in level of pollution, hon'ble Supreme Court vide its order dated 14.11.2019 in the matter of **M.C. Mehta v Union of India & others, writ petition (c) No. 13029/1985**, had imposed complete ban on construction and excavation work which was uplifted completely on 14.02.2020.


11. The construction work is going on its full swing and major part of it, is already completed, despite the financial obstacles due to economic slowdown. Due to current pandemic covid-19 situation the construction at the site is slowed down. Moreover, on 30.09.2020 a team appointed by hon'ble authority duly inspected the project site and was satisfied with the construction activities. The money paid by allottees have been utilised for the construction of the project and it is not feasible to pay back the amount as sought by the complainants.

12. It is further contended that there is an arbitration clause (clause 28.2) in the agreement, complainants without invoking arbitration proceedings, have filed this complaint and the same is liable to be dismissed.

13. It (respondent) had always kept complainants aware of the status of the project and to avoid contractual obligation

complainants have filed frivolous which is liable to be dismissed.

14. I have heard the counsels for the parties and have perused the record
15. It is an admitted position that occupation certificate for the said tower has not been obtained by the respondent. In compliance of the order dated 30.07.2021, respondent has filed an affidavit of Mr. Ramphal Yadav, authorised representative of respondent company wherein it has been mentioned that due to several court orders and other force majeure conditions, the construction work was halted for 37 weeks. As per table of status of construction and photographs filed by the respondent, the project is almost 86 % complete.
16. As per terms of buyer's agreement construction work was to be completed within 39 months from the date of execution of agreement (16.05.2016) . Even if contention of the respondent that construction was halted for 37 weeks due to various orders is accepted, still the construction work ought to have been completed by 16.05.2020. when even as per respondent construction remained stopped for 37 weeks due to various orders (of courts) the respondent is entitled to grace period of 37 weeks only and not of 6 months as mentioned in BBA. As per the status report filed by the respondent the project is 85 % complete and no fixed date has been given by the respondent as when it will deliver the possession of the unit to the complainants.

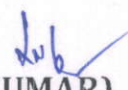

A.O.,
11-10-21

17. Admittedly, the complainant had opted for construction linked payment plan. As per Id. Counsel for complainants his clients have made payments which are more than proportionate stage of construction. This plea is not refuted on behalf of respondent.
18. As per clause 11.6 of the buyer's agreement, in case of delay of more than 12 months in completion of construction of unit as per scheduled given in the agreement, the allottee shall be entitled to withdraw from the project and claim refund of the amount paid by him with 9 % interest.
19. So far as contention of respondent with respect to arbitration clause is concerned, none of parties appeared serious about this provision. Even respondent did not invoke any proceedings under Arbitration Act. Moreover, Act of 2016, being a special legislation for protection of interest of consumers in real estate sector, has overriding effect over other laws in existence, even over agreement between the parties.
20. When a buyer has paid 87 % of total sale consideration, same was well within her/his right to claim possession as per agreement. A buyer cannot be made to wait indefinitely, for his/her dream unit. It is not claimed on behalf of respondent that it has received the occupation certification for the tower in which the allotted unit is situated.
21. In the facts proved as above, complaint in hands is allowed and respondent is directed to refund amount received from complainants i.e. Rs 59,43,806 within 90 days from today,

with interest @ 9.3 % p.a. from the date of each payment, till realisation of amount. A cost of litigation Rs 50,000 is also imposed upon respondent to be paid to complainants.

File be consigned to registry.

11.10.2021


(RAJENDER KUMAR)
Adjudicating Officer
Haryana Real Estate Regulatory Authority
Gurugram

Judgement uploaded on 14.10.2021.

HARERA
GURUGRAM