

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

Complaint no.	:	4724 of 2020
Date of filing complaint:		21.12.2020
First date of hearing:		19.02.2021
Date of decision	:	15.07.2022

1. Sh. Raj Kumar Mehta S/o Sh. Dina Nath Mehta 2. Smt. Anu Mehta W/o Sh. Raj Kumar Mehta Both R/O: House no. 59, PLA, Sector-15, Hisar	Complainants
Versus	
M/s Aaliyah Real Estates Private Limited Regd. office: Plot No.-5, District Center Jasola, New Delhi - 110025	Respondent

CORAM:

Dr. KK Khandelwal

Chairman

Shri Vijay Kumar Goyal

Member

APPEARANCE:

Sh. Sukhbir Yadav (Advocate)

Complainants

Sh. Somesh Arora (Advocate)

Respondent

ORDER

- The present complaint has been filed by the complainants/allottees 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) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details		
1.	Name of the project	"Baani City Centre"		
2.	Project location	Sector 63, Village Maidawas, Gurugram, Haryana		
3.	Nature of the project	Commercial Complex		
4.	DTCP license no. and validity status	80 of 2010 dated 15.10.2010 Valid up to 14.10.2023		
5.	Name of licensee	M/s Aaliyah Real Estate Pvt. Ltd. (BIP Holder vide order dated 04.01.2016)		
6.	RERA registration details	Applied on 28.01.2022		
7.	Allotment letter	01.01.2013 [As per annexure P-3, page no. 25 of complaint]		
8.	Unit details			
	S.no.	Unit no.	Area	Documentary proof
	a.	410, 4 th floor	1224 sq. ft.	As per allotment letter dated 01.01.2013 at page no. 25 of complaint
	b.	304, 3 rd floor	796 sq. ft.	As per letter dated 27.01.2014 at page no. 29 of complaint
9.	Date of apartment buyer's buyer agreement	01.12.2014 [As per page 35 of complaint]		
10.	Possession clause	2. Possession 2.1 The intending seller, based upon its		

		<p><i>present plans and estimates, and subject to all exceptions, proposes to handover possession of the commercial space within a period of forty-two (42) months from the date of approval of building plans of the commercial complex or the date of execution of this agreement, whichever is later ("commitment period"). Should the possession of the commercial unit not be given within the commitment period due to any reason (except delays mentioned in clause 9 below), the intending purchaser agrees to an extension of one hundred and eighty (180) days ("grace period") after expiry of the commitment period for handing over the possession of the commercial unit.</i></p> <p>[page no. 41 of complaint]</p>	
11.	Date of building plan	24.01.2013 [As per page no. 66 of the reply]	
12.	Date of revised building plan	03.02.2016 [page no. 72 of the reply]	19.02.2020 [page no. 82 of the reply]
13.	Due date of possession	01.12.2018 [Calculated from date of buyer's agreement i.e. 01.12.2014, being later.] Grace period of 180 days is allowed.	
14.	Total sale consideration	Rs. 76,23,400 (BSP) Rs. 94,26,541.33/- (TSC) [As per statement of account dated 05.02.2021 at page no. 24 of reply]	
15.	Amount paid by the complainants	Rs. 30,91,103/- [As per statement of account dated 05.02.2021 at page no. 24 of reply]	
16.	Request for withdrawal by complainant	30.03.2018 [As alleged by the complainant on page 08]	

		of CRA that after issue of notice of possession dated 30.03.2018, the complainant visited the office of the respondent and asked for cancellation of subject unit]
17.	Cancellation notice	13.02.2019 [As per annexure P10, page no. 64 of complaint]
18.	Part occupation certificate	16.01.2018 [As per page no. 77 of reply]
19.	Notice for possession dated	30.03.2018 [As per page no. 60 of complaint]

B. Facts of the complaint:

3. That in the month of October 2012 the complainant, Mr. Raj Kumar Mehta received a marketing call from a real estate agent namely Mr. Harinder Mehta (Mobile No. 8527697474 & 9711196943), who represents himself as an authorized agent of the respondent-builder and marketed for booking in the commercial project known as "Baani City Center" at Sector - 63, Gurugram. The respondent represented the project "Experience Elevated Lifestyle at, Golf Course Extension, Sector-63, Gurgaon" as an "Awarded project launch of the year 2011". The marketing staff of the respondent gave a pre-printed application form and a brochure and assured that possession of the apartment would be delivered within 42 months from the date of booking.
4. That being impressed by the projections made by the respondent, the complainant booked a service apartment on 16.10.2012 and paid Rs.

7,00,000/- as booking amount. The respondent allotted a unit bearing No. 410 having a super area of 1224 sq. ft. at the rate of Rs. 9400/- per sq ft. in the project.

5. That on 01.01.2013, the respondent issued a letter of allotment of service apartment-No 410 having approx. super area of 1224 sq. ft. in the project. That on 12.01.2013, 28.01.2013 & 31.05.2013, the complainants paid Rs. 4,30,820/-, Rs. 10,10,520/- and R 2,30,844/- to the respondent. Further, on 27.01.2014, on request of the complainants, the respondent changed the original booked and allotted unit to new unit No. 304 with a super area of 796 sq. ft.
6. That on 03.03.2014 & 20.03.2014, the complainants issued cheques of Rs. 1,70,000/- and Rs. 1,30,000/- & Rs. 4,18,879/- respectively to the respondent. That after a long follow-up, on 01.12.2014, a pre-printed,, unilateral, one-sided, arbitrary ex-facie commercial space buyer's agreement (hereinafter called the "BBA") was executed between parties. This agreement has a plethora of clauses and according to clause No. 2.1, the builder-respondent proposed to offer the possession of the unit within a period of 42 months from the date of approval of the building plans of the commercial complex or the date of execution of this agreement, whichever was later ("Commitment Period") and further entitled to a grace period of 180 days. It is pertinent to mention that the execution of the buyer agreement was completely within the domain of the respondent-builder, and the terms of the such agreement were arbitrary and one-sided.

Therefore, the due date of possession has to be computed from the date of approval of building plans. The building plans were approved on 05.01.2012, so the due date of possession was 05.01.2016 along with a 180 days grace period. It is pertinent to mention here that the booking was made on 16.10.2012 and till the date of execution of buyer's agreement, the complainants have paid Rs. 30,91,103/-.

7. Thereafter, the builder put one-sided and arbitrary buyer's agreement before the complainants and under the compelling circumstances, they had to sign the agreement. The complainants approached several banks to avail the loan on the said service apartment, but the said project of the respondent was not approved by them. It is pertinent to mention here that at the time of receiving the booking amount for the unit, the office bearers of the respondent assured them that said project will be financeable from leading Banks. However, when the respondent failed to get the project approved by leading banks, it endorsed on the statement of account dated 30.01.2015 that "40% payment complete. For installment becoming due afterward (40% of BSP) if you go for bank loan funding, then no interest was to be charged on subsequent installments (post 40% of BSP) till the time IKON tower City Center Bank loan gets approved, as a special consideration". The complainants have paid an amount of Rs. 30,91,103/- i.e. 41.31% of B.S.P. till 02.04.2014.
8. That the complainants visited several times the office of the respondent and made phone calls asking for the status of the project and approval of

the project from the banks. But the respondent did not pay any heed to the reasonable demand of the complainants. On 30.03.2018 after obtaining occupation certificate on 16.01.2018, the respondent sent a final notice for possession and asked for payment of Rs. 93,13,843/-. It is pertinent to mention here that the respondent has revised the area of the unit and asked for unjustified demands and an interest of Rs. 27,53,580/-.

9. That on receipt of above said notice of the possession, the complainants visited the office of the respondent and asked for cancellation of allotment (surrender of the unit) and refund of money as per law. But the respondent did not pay heed to the just and reasonable demand of the complainants. On 13.02.2019, the respondent sent a cancellation notice to the complainants and mentioned that "an amount of 15% of the total consideration, being the "earnest money", received from them against the above-mentioned allotment is hereby forfeited".
10. That it is pertinent to mention here that as per clause no. 1.9 of the commercial space buyer's agreement the consideration means basic sale price and PLC. There is no PLC against the said unit.
11. That the complainant Mr. Raj Kumar Mehta retired from his job on 31.05.2020 and till 2016, the project of the respondent was not approved by leading banks. Thereafter, the banks refused to grant the loan due to age factor and a short period of balance service. The complainants visited the office of the respondents and asked for balance money as per regulation of authority, but it shunted out them from their office.

12. That the main grievance of the complainants is that despite they being ready to bear the loss of forfeiture of the earnest money as per regulation dated 05.12.2018, the respondent was not releasing the balance payment after deductions of Rs. 7,48,240/- i.e., 10% of BSP.
13. That the above said cancellation was done after the coming into force of the "forfeiture of earnest money by the builder Regulations, 2018" and since 2016, the complainants regularly were visiting the office of the respondent as well as the construction site and making efforts to get sanction of the loan but all in vain.
14. That due to the above acts of the respondent and the unfair terms and conditions of the buyer agreement, the complainants have been unnecessarily harassed mentally as well as financially, therefore the opposite party is liable to compensate them on account of the aforesaid act of unfair trade practices.

C. Relief sought by the complainants:

15. The complainants have sought following relief(s):
 - i. Direct the respondent to refund the paid money along with prescribed interest from the date of payment till date of refund.
 - ii. Direct the respondent not to give effect to unfair clauses unilaterally incorporated in the BBA.

D. Reply by respondent:

The respondent by way of written reply made following submissions: -

16. That the complainants have failed to place material facts on record and have filed the present complaint with the sole intention to cause legal injury to it. All allegations made in this complaint are a figment of the complainants' imagination and do not hold true as the complainants themselves defaulted on payment terms due to financial constraints and are in turn holding the respondent accountable.
17. That in the present case, the project began, was constructed and the occupancy certificate was applied for before the coming into force of the Haryana Real Estate (Regulation and Development) Rules, 2017 on 28.07.2017. It is submitted that the present scope of the complaint is pre-RERA and that the Act and jurisdiction of the authority does not hold true in the present complaint and should be governed by the commercial space buyer agreement as signed by both parties. The respondent had filed an application for occupation certificate on 22.05.2017 and the authority did not file any objection to the said application in all respect for the purpose of obtaining the occupation certificate.
18. That as per sub code 4.10(5) of the Building Code, the occupation certificate is deemed to have been issued after completion of 60 days from the date of filing the application (i.e. 22.05.2017) and the Haryana Real Estate (Regulation and Development) Rules, became applicable with effect from 28.07.2017. The respondent is not required to be registered with the authority as it is not an "ongoing project" as provided in rule 2(1)(0) of the Haryana Real Estate (Regulation and Development) Rules, 2017 which

were even otherwise published in the official gazette after the respondent received deemed occupation certificate.

19. That the matter with respect to the aforesaid issue is also sub-judice as the respondent has filed an appeal before the Haryana Real Estate Appellate Authority vide appeal number H-REAT-470-2020 (GRG) dated 28.12.2020 in complaint No. RERA-GRG-3271-2020.
20. That it is also pertinent to note that the said matter is also sub judice as personal hearings have been granted to the complainant on the issue of "show cause notice for non-registration of ongoing project under provisions to section 3(1) of the Real Estate (Regulation and Development) Act, 2016 where the respondent has attended hearings on 20.01.2020, 10.02.2020, 16.03.2020 whereby the said file was merged with another file suo moto, which is pending. So, the respondent has already in compliance and his averments are being heard by the authorities for exemption from registration.
21. That the present case is also not maintainable under law and there is no delay by the respondent in offering the possession of unit in terms of the commercial space buyer agreement dated 01.12.2014. The complainants have failed to clear their outstanding dues for the reasons best known to them and levelling false allegations against the respondent by stating that it has failed to get project approved from leading banks. The present complaint being false & frivolous is liable to be dismissed. It is submitted that the project was approved by ICICI Bank Limited vide APF file no.

GUR/14/4880 dated 18.04.2016. Even though, the loan approval doesn't come under domain of respondent and it is the responsibility of the purchaser vide which source it intends to pay. Even then, the respondent accommodates its customers by getting the project approved by leading bank.

22. That the complainants have placed false facts with regard to the construction status of the project. The complainants have failed to put on record that the respondent has completed the entire construction of the project for which part occupation certificate was received on 16.01.2018.
23. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

E. Jurisdiction of the authority:

24. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 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.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(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;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoter, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objections regarding that the respondent has made an application for grant of occupation certificate before coming into force of RERA:

25. The respondent-promoter has raised the contention that the said project of the respondent is a pre-RERA project as the same has already applied for obtaining occupation certificate from the competent authority on 22.05.2017 i.e. before the coming into force of the Haryana Real Estate

(Regulation and Development) Rules, 2017 on 28.07.2017. As per proviso to section 3 of Act of 2016, ongoing projects on the date of this Act i.e. 28.07.2017 and for which completion certificate has not been issued, the promoter shall make an application to the authority for registration of the said project within a period of three months from the date of commencement of this Act and the relevant part of the Act is reproduced hereunder:-

Provided that projects that are ongoing on the date of commencement of this Act and for which the completion certificate has not been issued, the promoter shall make an application to the Authority for registration of the said project within a period of three months from the date of commencement of this Act:

26. The legislation is very clear in this aspect that a project shall be regarded as an “ongoing project” until receipt of completion certificate. Since no completion certificate has yet been obtained by the promoter-builder with regards to the concerned project, the plea advanced by it is rejected.

G. Entitlement of the complainants for refund:

G.I Direct the respondent refund the paid money along with prescribed interest from the date of payment till date of refund.

27. The project detailed above was launched by the respondent as commercial colony. Vide allotment letter dated 01.01.2013, unit No. 410 admeasuring 1224 sq. ft. was allotted to the complainants but the same was subsequently changed vide letter dated 27.01.2014, to 304 admeasuring 796 sq. ft. A buyer’s agreement was executed between the parties on 01.12.2014 and a consideration of Rs. Rs. 30,91,103/- was paid by the complainants towards total basic sale price of Rs. 76,23,400/-.

28. In the present case, the complainants’ alleged that at the time of booking the office bearers of the respondent assured that the said project would be

financeable from the leading bank and the respondent contended the contentions of the complainant by stating that project was approved by Tata Capital Financial Service Limited and they were informed about loan approval vide letter dated 04.09.2015 and later approved by ICICI Bank limited vide letter dated 18.04.2016. Thereafter, on issuance of notice of possession dated 30.03.2018, the complainants visited the office of the respondent and asked for cancellation of subject unit. So, in view of said request by the complainants, the respondent cancelled the subject unit vide letter dated 13.02.2019 wherein forfeiting 15% of the total sale consideration as earnest money in view of clause 1.9 of agreement dated 01.12.2014. But there is nothing on record that the said amount has been returned back to the complainants.

29. Further, the Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018, provides as under-

"5. AMOUNT OF EARNEST MONEY

Scenario prior to the Real Estate (Regulations and Development) Act, 2016 was different. Frauds were carried out without any fear as there was no law for the same but now, in view of the above facts and taking into consideration the judgements of Hon'ble National Consumer Disputes Redressal Commission and the Hon'ble Supreme Court of India, the authority is of the view that the forfeiture amount of the earnest money shall not exceed more than 10% of the consideration amount of the real estate i.e. apartment/plot/building as the case may be in all cases where the cancellation of the flat/unit/plot is made by the builder in a unilateral manner or the buyer intends to withdraw from the project and any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer"

30. In view of aforesaid circumstances, the respondent is directed to refund the amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 9.80% p.a. on the refundable amount, from the date of cancellation till the date of realization of payment as the cancellation of the allotted unit was made on 13.02.2019 after the Act of 2016.

G.II Direct the respondent not to give effect to unfair clauses unilaterally incorporated in the BBA.

31. After dealing with relief No. 1, the aforesaid relief sought by the complainants-allottees became redundant. Hence, no direction to this effect.

H. Directions of the Authority:

32. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent-promoter is directed to refund the amount after deducting 10% of the sale consideration of the unit being earnest money as per regulation Haryana Real Estate Regulatory Authority Gurugram (Forfeiture of earnest money by the builder) Regulations, 2018 within 90 days from the date of this order along with an interest @ 9.80% p.a. on the refundable amount, from the date of cancellation




till the date of realization of payment as the cancellation of the allotted unit was made on 13.02.2019 after the Act of 2016.

- ii) A period of 90 days is given to the respondent to comply with the directions given in this order and failing which legal consequences would follow.

33. Complaint stands disposed of.

File be consigned to the registry.


(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram


(Dr. KK Khandelwal)
Chairman

Dated: 15.07.2022