

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

Complaint no. :	3958 of 2021
First date of hearing:	12.11.2021
Date of decision:	06.07.2022

Mahesh Jain

R/o: - Flat no. 6099, B-8, Vasant Kunj, New Delhi-110070

Complainant

Versus

1. Ansal Properties & Infrastructure Limited
Address: - 115 Ansal Bhawan, 16 Kasturba Gandhi Marg, New Delhi-110001
2. Samayak Projects Pvt. Ltd.
Address: - 111, 1st floor, Antriksh Bhawan, 22 Kasturba Gandhi Marg, New Delhi-110001

Respondents

CORAM:

Dr. K.K. Khandelwal
Shri Vijay Kumar Goyal

**Chairman
Member**

APPEARANCE:

Ms. Priyanka Aggarwal (Advocate)
Mr. Tushar Bahmani (Advocate)

Complainant
Respondents

ORDER

1. The present complaint dated 01.10.2021 has been filed by the complainant/allottee in Form CRA under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 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 to the allottees as per the agreement for sale executed inter se them.

A. Project and unit related details

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

S.No.	Heads		Information		
1.	Project name and location		"The Fernhill", Sector 91, Gurugram		
2.	Project area		14.412 acres		
3.	Nature of the project		Group Housing Colony		
4.	DTCP license no. and validity status		48 of 2010 valid up to 20.06.2016		
5.	Name of licensee		Aravali Heights Infratech Pvt. Ltd. & ors.		
6.	RERA registration details				
	S no.	Registration No.	Registration date	Valid up to	Towers
	i.	392 of 2017	22.12.2017	31.12.2019	Tower A, B, C, D, P, EWS 2 & convenient shopping
	ii.	389 of 2017	22.12.2017	31.12.2020	Tower L, M, E, F, G, H, J, K, EWS 1, nursery school (2 nos.), community building, 28 villas
7.	Unit no.		0704-P-N/1002 [pg. 37 of complaint]		



8.	Unit measuring	2184 sq. ft. [pg. 37 of complaint]
9.	Date of execution of flat buyer agreement	10.07.2013 [pg. 64 of complaint]
10.	Payment plan	Construction link
11.	Possession clause	5.1 <i>Subject to clause 5.2 and further subject to all the buyers/allottees of the villa/flats in the said residential project, making timely payment, the company shall endeavour to complete the development said residential project and the said villa/flat as far as possible within 48 months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later.</i> (Emphasis supplied) [page 74 of complaint]
12.	Date of commencement of construction as per customer ledger dated 28.12.2016	14.08.2014 [pg. 44 of complaint]
13.	Due date of possession	14.02.2019 [Note: Due date calculated from date of commencement of construction i.e., 14.08.2014 being later. Grace period allowed being unqualified]

14.	Delay in handing over possession till the date of order i.e., 06.07.2022	3 years 4 month 22 days
15.	Basic sale consideration as per BBA dated 10.07.2013	₹ 69,19,295/- [pg. 69 of complaint]
16.	Total sale consideration as per customer ledger dated 28.12.2016	₹ 80,21,770/- [pg. 38 of complaint]
17.	Amount paid by the complainant as per customer ledger dated 28.12.2016	₹ 56,24,517/- [pg. 39 of complaint]
18.	Status of the project	On-going project
19.	Occupation certificate	Not yet obtained
20.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has made the following submissions in their complaint:
 - a. That the complainant is a law-abiding citizen and consumer who have been cheated by the malpractices adopted by the respondent is stated to be a builder and is allegedly carrying out real estate development. Since many years, the complainant being interested in the project because it was a housing project, and the complainant needed an own home for their family.
 - b. That one-sided development agreement and inordinate delay in possession has been one of the core concerns of home buyers. The terms of the agreement are non-negotiable and buyers even if they do not agree to a term, there are no option of modifying it or even deliberating it with the builder. This aspect has often been unfairly exploited by the builder, whereby the builder imposes unfair and discriminatory terms and conditions. That the complainant was

subjected to unethical trade practice as well as subject of harassment, flat buyer agreement clause of escalation cost, many hidden charges which was forcibly imposed on buyer at the time of possession.

- c. That the complainant approached to the respondent for booking of an Apartment admeasuring 2321 sq. ft in "THE FERNHILL", Sector- 91, Gurugram and paid booking amount Rs 1193794/- through cheques no. 724297, 724298 & 724299, chq. dated 25.03.2012 & 02.04.2012.
- d. That the complainant was initially allotted the unit no. P-0902, 09th floor, admeasuring 2321 sq ft in the project "THE FERNHILL", sector- 91, Gurugram, Haryana through allotment letter dated 04.04.2012 after that respondent changed the unit from unit no. P-0902 admeasuring 2321 sq ft to unit 0704-N-1002 admeasuring 2321 sq. ft in the project "THE FERNHILL", Sector- 91, Gurugram, Haryana through letter dated 17.12.2013.
- e. That the respondent to dupe the complainant in their nefarious net even executed a one-sided flat buyer agreement signed between complainant and M/S Ansal Properties & Infrastructure Limited and M/s Samyak Projects Private Limited, on dated 10.07.2013, just to create a false belief that the project shall be completed in time bound manner, and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainant.
- f. That the total cost of the said flat is Rs. 80,21,770/- including EDC and PLC and sum of Rs. 67,27,785.5/- Paid by the complainant (more than 80% of total sale consideration) in time bound manner.

- g. That it is pertinent to mention here that according to the statement the complainant paid a sum of Rs 67,27,785.5/- to the respondent till date and only last instalment is remain as per the payment schedule (more than 80% of total sale consideration paid by complainant) and paid amount is demanded by the respondent without doing appropriate work on the said project so after extracting more than 80% amount which is illegal and arbitrary.
- h. That the builder in last 9 years made false promises for possession of flat and current status of project is still desolated and raw and not even 70 % is completed and builder has committed breach of trust and agreement. That as per section 19 (6) the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act) complainant has fulfilled his responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, the complainant herein has not breached any of its terms of the agreement.
- i. That complainant has paid all the instalments timely and deposited Rs. 67,27,785.5/- that respondents in an endeavour to extract money from allottees devised a payment plan under which respondent linked more than 35 % amount of total paid against as advance and 60 % amount linked with the construction of super structure only) of the total sale consideration to the time lines, which is not depended or co-related to the finishing of flat and Internal development of facilities amenities and after taking the same respondent have not bothered to any development rest 5 % lined with offer of possession.
- j. That respondent executed FBA is one sided and at the time of offer of possession builder used new trick for extracted extra money

- from complainant and forcibly imposed many unilateral charges. That respondents have charged interest on delayed instalment @ 24 % p.a. compounded quarterly interest as per clause 4.5 of FBA and offer the delay penalty for himself is just Rs 10 per sq. ft per month as per clause no 5.5 is totally illegal arbitrary and unilateral.
- k. That the respondent has indulged in all kinds of tricks and blatant illegality in booking and drafting of FBA with a malicious and fraudulent intention and caused deliberate and intentional huge mental and physical harassment of the complainant and his family has been rudely and cruelly dashed the savoured dreams, hopes and expectations of the complainant to the ground and the complainant is eminently justified in seeking possession of flat along with delayed possession charges.
- l. That due to the malafide intentions of the respondent and non-delivery of the flat unit the complainant has accrued huge losses on account of the career plans of their family member and themselves and the future of the complainant and their family are rendered dark as the planning with which the complainant invested her hard-earned monies have resulted in sub-zero results and borne thorns instead of bearing fare ruts.
- m. It is submitted that the cause of action to file the instant complaint has occurred within the jurisdiction of this Hon'ble Authority as the apartment which is the subject matter of this complaint is situated in Sector 91, Gurugram which is within the jurisdiction of this Hon'ble Authority.

C. Reliefs sought by the complainant

4. The complainant is seeking the following relief:

- a. Pass an order for delay interest on paid amount of Rs 67,27,785.5/- from 10.07.2017 along with pendente lite and future interest till actual possession after getting occupancy certificate thereon.
 - b. Direct the respondent to adjust the delay in last demand and immediately hand over the possession of unit in habitable condition with all amenities mentioned in brochure after getting occupancy certificate.
 - c. Direct the respondent to quash the unilateral term of agreement.
 - d. Direct the respondent to not increase the super area without justification.
 - e. Pass such other and further order(s) as this Hon'ble Regulatory Authority may deem fit and proper in the facts and circumstances of the present case.
5. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply filed by the respondent

6. Notice to the promoter/respondent through speed post and through e-mail address (fernhillgrievancesfgurgaon@ansalapi.com) was sent; the delivery report of which shows that delivery was completed. Despite service of notice, the promoter/respondent has failed to file a reply within stipulated time period. Since the respondent company's put in appearance through its counsel Sh. Tushar Bahmani on 30.03.2022. However, the respondent has failed to comply with the orders of the authority dated 30.03.2022, by not filing written

reply within the time allowed, therefore, the defence of the respondent is struck off.

E. Jurisdiction of the authority

7. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

8. 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

9. 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)

Section 11

.....

(4) The promoter shall-

- (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 promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

10. 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 of the authority on relief sought by complainants

F.I. Pass an order for delay interest on paid amount of Rs 6727785.5/- from 10.07.2017 along with pendente lite and future interest till actual possession after getting occupancy certificate thereon and direct the respondent to adjust the delay in last demand and immediately hand over the possession of unit in habitable condition with all amenities mentioned in brochure after getting occupancy certificate.

11. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges. Clause 5.1 of the apartment buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

"5.1. Subject to clause 5.2 and further subject to all the buyers/allottees of the villa/flats in the said residential project, making timely payment, the company shall endeavor to complete the development said residential project and the said villa/flat as far as possible within 48 months, with an extended period of 6 months, from the date of execution of this agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan whichever is later."

12. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the

complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

Admissibility of grace period: The promoter has proposed to hand over the possession of the apartment within a period of 48 months from date of agreement or the date of commencement of construction whichever is later. The due date is calculated from date of commencement of construction i.e., 14.08.2014 being later. The period of 48 months expired on 14.08.2018. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period in the possession clause. Accordingly, the authority allows this grace period of 6 months to the promoter at this stage.

13. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter,

interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

14. The legislature in its wisdom in the subordinate legislation under rule 15 of the rules has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
15. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., **06.07.2022** is 7.50%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 9.50%.
16. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

"(z) "interest" means the rates of interest payable by the promoter or the allottees, as the case may be.

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default;

(ii) the interest payable by the promoter to the allottees shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottees to the promoter shall be from the date the allottees defaults in payment to the promoter till the date it is paid;"

17. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **9.50%** by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.
18. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act, by not handing over possession by the due date as per the agreement. By virtue of clause 30 of the agreement executed between the parties on 10.07.2013, the possession of the subject apartment was to be delivered within 48 months from the date of execution of agreement or date of start of construction whichever is later. The due date is calculated from date of commencement of construction i.e., 14.08.2014 being later. The period of 48 months expired on 14.08.2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 14.02.2019. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 14.02.2019 till the actual handing over of possession of

the unit, at prescribed rate i.e., 9.50 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F.II. Direct the respondent to quash unilateral term of agreement.

19. The complainant in its pleading has specified that the respondent has already charged interest @ 24% p.a. as per clause 4.5 of the BBA dated 10.07.2013 which is unilateral and arbitrary in nature.
20. Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 06.07.2022 is 7.50%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.50%. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges. Accordingly, this unilateral clause of the BBA is quashed.

F.III. Direct the respondent not to increase the super area without justification.

21. The authority has gone through the clause 3D of the builder buyer's agreement and there is evidence on the record to show that the respondent had allotted an approximate super area of 2321 sq. ft (215.63 sq. mtrs.) and also, by virtue of clause 2.3 of the said agreement dated 10.07.2013, the complainant had been made to understand and

had agreed that the super area mentioned in the agreement was only a tentative area which was subject to the alteration till the time of construction of the complex. The relevant clause of the agreement is reproduced hereunder:

"2.3

The Buyer agrees and understands that the Plans and Specifications of the said Residential Project are tentative and are subject to change, if deemed necessary in the interest of the said Residential Project, by the Company at its sole discretion, as may be required by the concerned government semi-government authorities including but not limited to the DTCP. The Company shall be entitled to affect such suitable alterations in the plans, as may be required in accordance therewith, including changes in the area, location and distinct number of the Villa/Flat. In regard to the suitability of such changes the opinion of the Company and its architects shall be final and binding on the Buyer Further, the Buyer undertakes that if as a consequence of such changes, there is any increase/decrease in the area of the said Villa/Flat or the said Villa/Flat becomes or cease to become preferentially located, revised price and/or applicable Preferential Location Charges (PLC) shall be payable in addition to and/or adjustable from (without any interest accruing thereon) the original consideration at which the said Villa/Flat has been booked for allotment by the Buyer In the eventuality of the Plans being revised, the charges towards basic sale price and other charges for area of increase/ decrease upto 10 % shall be payable adjustable at the rate agreed hereto while the charges towards basic sale price and other charges for area of increased decrease beyond 10% shall be payable adjustable at the then prevailing company's price."

22. The authority is of the considered opinion that each and every minute detail must be appraised, schooled and provided to the allottee regarding the increase/decrease in the super area and he should never be kept in dark or made to remain oblivious about such an important fact i.e., the exact super area till the receipt of the offer of possession letter in respect of the unit.

G. Directions of the authority


23. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- a. The respondent is directed to pay the interest at the prescribed rate i.e., 9.50% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 14.02.2019 till the actual handing over the possession of the unit to the complainant.
 - b. The arrears of such interest accrued from 14.02.2019 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.
 - c. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - d. The rate of interest chargeable from the complainant /allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.50% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delay possession charges as per section 2(za) of the Act.
 - e. If there is no amount outstanding against the allottees or less amount outstanding against the allottees then the balance delay possession charges shall be paid after adjustment of the outstanding against the allottee.

f. The respondent shall not charge anything from the complainant which is not the part of the buyer's agreement. However, holding charges shall not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

24. Complaint stands disposed of.

25. File be consigned to registry.


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairperson

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.07.2022

HARERA
GURUGRAM