

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

Complaint no. 334 of 2018
Date of First hearing 24.07.2018
Date of decision 16.05.2019

Mr. Pankaj Yadav
H.no. 217/12, Krishna Colony, Gali no. 6,
Gurugram-122001

Complainant

Versus

M/s Ansal Properties and Infrastructure
Limited
Office at: 115, Ansal Bhawan, 16 K G
Marg, New Delhi-110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Braham Parkash Father of complainant
Shri Naresh Kumar Advocate for the complainant
Shri Siddharth Yadav Advocate for the respondent

ORDER

1. A complaint dated 28.05.2018 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. Pankaj Yadav, against the promoter M/s Ansal Properties and

Infrastructure Limited on account of violation of clause 5.1 of the flat buyer agreement executed on 10.07.2013 for unit no. 0704-G/0201 with a super area of 1877 sq. ft. in the project “The Fernhill” for not giving possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since the flat buyer agreement has been executed on 10.07.2013 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, so the penal proceedings cannot be initiated retrospectively. Therefore, the authority has decided to treat this complaint as an application for noncompliance of statutory obligation on part of the respondent in terms of the provision of section 34(f) of the Act *ibid*.

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

DTCP Licence no. 48 dated 21.06.2010

1.	Name and location of the project	“The Fernhill” ,Sector 91, Gurugram
2.	Nature of real estate project	Group housing colony
3.	Unit no.	0704-G-0201, tower G
4.	Project area	14.412 acres

5.	Registered/ not registered	Registered (389 of 2017) phase 2
6.	RERA registration no.	389 of 2017
7.	Completion date as per RERA registration certificate	31.12.2020
8.	Date of booking	20.04.2011
9.	Allotment letter	31.08.2011
10.	Date of flat buyer agreement	10.07.2013
11.	Total consideration as per schedule of payment annexed with the said agreement	Rs 49,24,691/-
12.	Total amount paid by the complainant	Rs 40,41,116/- as per statement of the complainant
13.	Payment plan	Construction linked plan
14.	Due date of delivery of possession. Clause 5.1 – 48 months + 6 months grace period from date of execution of agreement i.e. 10.07.2013 or from the date of commencement of construction of the particular tower in which the said unit is situated i.e 31.07.2014, whichever is later	31.01.2019
15.	Delay in handing over possession of the said unit till date of decision	3 months and 16 days
16.	Penalty clause as per flat buyer agreement dated 10.07.2013	Clause 5.5- Rs. 10/- per sq. ft. of the area of the said flat per month for the period of delay

3. The details provided above have been checked on the basis of the record available in the case file which have been provided

by the complainant and the respondent. A flat buyer agreement dated 10.07.2013 is available on record for unit no. 0704-G-0201, tower G according to which the possession of the aforesaid unit is to be delivered by 31.01.2019. The respondent has failed to deliver the said unit by the due date and has thus failed to fulfil its committed liability.

4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 06.09.2018. The case came up for hearing on 24.07.2018, 06.09.2018, 11.10.2018, 21.12.2018, 23.01.2019, 36.03.2019 and 16.05.2019. The reply filed by the respondent has been perused by the authority.

Facts of the complaint

5. The complainant submitted that he booked a unit in the project named "The Fernhill" in Village Mewka, Sector 91, Gurugram. Accordingly, he was allotted a unit bearing 0704-G-0201, tower G, phase 2 vide allotment letter dated 31.08.2011

6. On 10.07.2013, flat buyer agreement was entered into between the parties wherein as per clause 5.1, the construction should have been completed within 48 months + 6 months grace period from the date of execution of agreement or from the date of commencement of construction, whichever is later. He made payments of all instalments demanded by the respondent.
7. The complainant submitted he visited the project site and found that there was no sign of any development or construction activity and all claims made by the respondent were untrue and false. There is no trace of construction activity at the project site.
8. The complainant submitted that the promoter has failed to deliver the project by due date nor issued the allotment letter of the booked unit.
9. The complainant also submitted that the respondent has committed deficiency in services and negligent.

10. The complainant also submitted that he has suffered monetary loss because of the unfair trade practises adopted by the respondent in their business practises.
11. The complainant submitted that vide letter dated 24.07.2014 respondent send addendum to the flat buyer agreement where by the price of the flat was suo-moto increased by the respondent from Rs. 2595. to Rs. 2624. Vide letter dated 31.08.2011, he was also entitled to a special rebate Rs. 1,46,124/- however, he was also not paid the same.
12. The complainant submitted that he took a loan of Rs. 28,00,000/- from State Bank of India in respect of the said flat.
13. The complainant submitted that on 13.04.2018 he visit the site and found that the project is nowhere near completion as no work is being carried out.

Issues raised by the complainant

14. **The issues raised by the complainant are as follows :-**
 - i. Whether the respondent has violated the terms and conditions of the agreement by not providing possession of the apartment to the complainant?

- ii. Whether complainant is entitled for interest @ 18% per annum from due date of the payment till the possession of flat is handed over?

15. Relief sought

- i. To deliver the possession of flat in fernhill group housing project.
- ii. To direct the respondent to pay 18% per annum interest from the date of payment till the possession of flat is handed over.

Respondent's reply

16. The respondent submitted that complainant has not approached this hon'ble forum with clean hand and is trying to conceal material facts relevant to the matter in dispute. The complainant is guilty of "**suppressio veri, suggestio falsi**" and the complaint is liable to be dismissed on this ground alone.

17. The respondent submitted that the present complaint has been filed prematurely, well before the agreed date for handover of possession of the flat/unit in dispute. The

complainant has filed the present complaint before any cause of action has arisen in favour of the complainant in terms of the application form/allotment letter/agreement executed between the parties.

18. The respondent submitted that complainant approached the respondent company in the month of April 2011 expressing interest in booking of a flat in the "Fernhill Project" (hereinafter referred to as "project") of the respondent company, proposed to be developed in Gurugram, Haryana. In this regard, the complainant filed an application form dated 20.04.2011 with the respondent company and based on the representation made in the said application form a residential floor/dwelling unit no. G-0201 (hereinafter referred to as the "Unit/Flat"), tower-G, in phase-2 of the project was provisionally allotted in name of the complainant for a net sale consideration of Rs.51,59,316/-.

19. The respondent submitted that allotment letter dated 31.08.2011 was duly issued in name of the complainant intimating about the fact of provisional allotment of the unit in his name.

20. The respondent submitted that a flat buyer agreement (hereinafter referred to as the “agreement/FBA”) dated 10.07.2013 stipulating all the relevant terms and conditions therein was executed between the parties.
21. The respondent submitted that issuance of the license for development of the project by the concerned authorities, the respondent also got issued layout plan and zoning plan and the respondent was fully committed to complete the project on time. However, the construction and development activities of the project came to a standstill due to a government notification wherein the government notified some part of the project to be covered under newly notified green belt. Due to this environmental notification hindrance the project got delayed and only after great persuasions and follow ups the issue got resolved and respondent could move ahead with the construction and development work.
22. The respondent submitted that phase 1 of the project stands completed with construction work of phase 2 is going on in full swing. Sanctioning of the building plan for some part of phase-2 of the project, in which the unit/tower of the complainant

was located, got delayed due to some environmental clearance issues, increased FAR and force majeure circumstances, etc., which were beyond the control of the respondent company. The present case clearly falls within the purview of the force majeure event as stipulated in clause 5.2 of the said agreement and there is no willful default on part of the respondent.

23. The respondent submitted that the 3rd floor of the tower-G in which the allotted unit of the complainant is located is fully completed with construction work of the remaining part of tower G along with phase 2 is going on in full swing and same is scheduled to be completed as per the RERA deadline.
24. The respondent submitted that project under which the complainant had filed and executed the agreement had commenced prior to enforcement/ commencement of RERA Act, 2016 and as such prior to RERA, the parties were bound by the agreed terms of the said agreement/application form/allotment letter. Subsequently, the RERA, 2016 came into force and the respondent company got the project registered under RERA, Haryana as per RERA guidelines and norms, wherein a RERA registration certificate dated

22.12.2017 with **validity upto December, 2020** for phase-2 of the project has been duly issued in favour of the respondent company. In term of said RERA certificate, the respondent company is fully committed and bound to complete the development work of the project by the said date and deliver the plots/floors/flats to the buyers including complainant.

25. The respondent submitted that project commenced prior to RERA Act and hence the agreed terms and conditions mentioned in application form/allotment letter between the parties were pre-dominant till the commencement of RERA Act. Now, some of the terms have been changed/ revised in terms of applicable RERA provisions and the project is now RERA registered and completion/ possession date has been revised/ changed. The answering respondent is committed to handover the possession before stipulated date. Hence, the present complaint is filed at premature stage and without any cause of action and hence, liable to be rejected forthwith. Besides, the complainant has filed the present complaint without exhausting the agreed alternate remedies for his

alleged grievances, which is neither tenable nor permissible either in law or equity.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

26. With respect to **first issue** raised by complainant, as per clause 5.1 of flat buyer agreement, the possession of the unit was to be handed over within 48 months with an extended period of 6 months, from the date of execution of the said 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. The buyer's agreement was executed on 10.07.2013 and the demand for commencement of construction was raised on 31.07.2014. Therefore, the due date of possession shall be computed from 31.07.2014. The clause regarding the possession of the said unit is reproduced below:

“5.1 Schedule for the possession of the said unit

The developer based on its present plans and estimates and subject to all just exceptions/force majeure/ statutory prohibitions/court’s order etc., contemplates to complete the construction of the said building/said unit within a period of 48 months from the date of execution of this agreement, with grace periods of 6 months each,

27. Accordingly, the due date of possession was 31.01.2019 and the possession has been delayed by 3 months and 16 days till the date of decision. The delay compensation payable by the respondent @ Rs. 10/- per sq. ft. per month of the said unit per month for the period of delay as per clause 5.5 of flat buyer agreement is held to be very nominal and unjust. The terms of the agreement have been drafted mischievously by the respondent and are completely one sided and unilateral. It has also been observed in para 181 of **Neelkamal Realtors Suburban Pvt Ltd Vs. UOI and ors. (W.P 2737 of 2017)**, wherein the **Bombay HC bench held that:**

“...Agreements entered into with individual purchasers were invariably one sided, standard-format agreements prepared by the builders/developers and which were overwhelmingly in their favour with unjust clauses on delayed delivery, time for conveyance to the society, obligations to obtain occupation/completion

certificate etc. Individual purchasers had no scope or power to negotiate and had to accept these one-sided agreements.”

28. With respect **to second issue** : the promoter is liable under section 18(1) proviso read with rule 15 to pay interest to the complainant, at the prescribed rate i.e 10.65%, for every month of delay till the offer of possession.

Findings of the authority

29. **Jurisdiction of the authority-**

Subject Matter Jurisdiction

The authority has complete jurisdiction to decide the complaint regarding 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.

Territorial Jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town & Country Planning Department, 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.

30. The complainant made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.
31. 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.
32. The complainant reserves his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.
33. Report dated 13.05.2019 of local commissioner appointed in the matter has been received and placed on record.
34. As per clause 5.1 of the agreement dated 10.07.2013, for unit no. 0704-G0201, tower G, in project "Fernhill" Sector 91, Gurugram, possession was to be handed over to the complainant within period of 48 months from the date of

commencement of construction of the particular tower in which the said unit is situated i.e. 31.07.2014 + 6 months grace period which comes out to be 31.01.2019. However, the respondent has not delivered the unit in time.

35. Complainant has already paid Rs. 40,41,116/- to the respondent against a total sale consideration of Rs. 49,24,691/-. As such, complainant is entitled for delay possession charges at prescribed rate of interest i.e. 10.65% per annum w.e.f 31.01.2019 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till offer of possession.

Decision and directions of the authority

36. 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 both parties in the interest of justice and fair play:

- i. The respondent is directed to pay interest at the prescribed rate of 10.65% per annum on the amount

deposited by the complainant with the promoter from the due date of possession i.e. 31.01.2019 upto the date of offer of possession.

- ii. The arrears of interest so accrued @ 10.65% p.a. so far shall be paid to the complainant within 90 days from the date of this order and thereafter monthly payment of interest till offer of possession shall be paid before 10th of subsequent month.
- iii. Complainant is directed to pay outstanding dues, if any, after adjustment of interest for delayed period.
- iv. The promoter shall not charge anything from the complainant which is not part of the agreement.
- v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.65% by the promoter which is same as is being granted to the complainant in case of delayed possession.

37. The order is pronounced.

38. Case file be consigned to the registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated 16.05.2019

Judgement uploaded on 28.05.2019

(Subhash Chander Kush)

Member