

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

Complaint no. :	5587 of 2022
Order reserved on:	03.01.2024

Mrs Rashmi Saluja

Address: J-6/118 Block J-6, Rajouri Garden, New Delhi
110027.

Complainant

Versus

Ansal Housing Limited
(Formerly known as Ansal Housing & Construction
Limited)

Address: - 2nd floor, Ansal Plaza, Sector-1, Near
Vaishali Metro Station Vaishali, Ghaziabad, Uttar
Pradesh - 201010

Respondent

CORAM:

Shri Ashok Sangwan

Member

APPEARANCE:

Shri Gaurav Rawat (Advocate)

None

Complainant
Respondent

ORDER

1. The present complaint dated 12.08.2022 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. N.	Particulars	Details
1.	Name of the project	Estella
2.	Project location	Sector 103, Gurugram, Haryana
3.	Project area	15.743 acres
4.	Nature of the project	Group housing colony
5.	DTCP license no. and validity status	17 of 2011 dated 08.03.2011 valid up to 07.03.2015
6.	Name of licensee	Rattan Singh and 9 others
7.	HRERA registered/ not registered.	Extension granted vide no.- 09 of 2019, dated:25.11.2019 Valid till:17.08.2020 (Validity of registration has expired)
8.	Unit no.	K-0306
9.	Unit area admeasuring	1255 sq. ft.
10.	Date of builder buyer agreement	11.02.2013 [pg. 24 of complaint]
11.	Possession clause	30.



		<p><i>The developer shall offer possession of the unit any time, within a period of 36 months from the date of execution of the agreement or within 36 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 31. Further, there shall be a grace period of 6 months allowed to the developer over and above the period of 36 months as above in offering the possession of the unit."</i></p> <p><i>(Emphasis supplied)</i></p>
12.	Date of start of construction as per SOA dated 20.08.2022	25.05.2012 [pg. 50 of complaint]
13.	Due date of possession	11.08.2016 [Note: Due date calculated from date of agreement i.e., 11.02.2013, being later. Grace period allowed being unqualified]
14.	Basic sale consideration as per BBA	₹ 42,72,375/- [pg. 44 of complaint]
15.	Amount paid by the complainant	₹ 42,26,246/- [as stated by the complainant]
16.	Occupation certificate	Not obtained

17.	Offer of possession	Not offered
-----	---------------------	-------------

B. Facts of the complaint

3. The complainant has made the following submissions in their complaint:

- a. That the complainants were subjected to unethical trade practice as well as subject of harassment, Apartment buyer agreement clause of escalation cost, many hidden charges which will be forcibly imposed on buyer at the time of possession as tactics and practice used by builder guise of a biased, arbitrary and one sided. That the executed Builder Buyer Agreement between Respondent and Complainant mentioned in Developer's Representations, DTCP given the licence 17 of 2011 dated 08.03.2011.
- b. That based on promises and commitment made by the Respondent, previous buyer booked a 2 BHK flat admeasuring 1255 sq. ft. along with one covered car parking and corner cum park PLC in the Unit no. K-0306, Residential Project "ESTELLA", Sector 103, Gurugram, Haryana. The initial booking amount of Rs 5,97,450.00 /-was paid dated 19.02.201 and the same was endorsed by respondent in complainant's favour.
- c. That the respondent to dupe the complainants in their nefarious net even executed Developer Buyer Agreement Signed Between M/s Ansal Housing Ltd. & Ish Kripa Properties Pvt Ltd. and Complainants dated 11.02.2013. Respondent create a false belief

that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands with threat of levying interest at a compounded rate of 24% for any delay in payment. Due to persistent demands and threats of levying interest for payment delay they were able to extract huge amount of money from the complainant.

- d. It is submitted that as per clause 23 of the apartment buyer agreement the buyer was charged very high interest rate i.e. 24% per annum, compounded quarterly. Furthermore, according to clause 24 of agreement if buyer fails to pay due instalments within stipulated period, the respondent could cancel the agreement and forfeit the earnest money, without giving any notice to buyer which in itself is perverse in nature.
- e. The complainant further submits that as per clause 35, the developer/ respondent had very cleverly and specifically accepted a meagre liability to pay Rs. 5/- per sq. ft. per month on the super area for the delay in offering of possession of the apartment beyond 42 months.
- f. That the total cost of the said flat is Rs. 35,08,125.00 (Including All other than Taxes) (As per Apartment Buyer Agreement Payment Plan Annexed with ABA and sum of Rs. 42,26,246/- Paid by the complainant in time bound manner.
- g. It is pertinent to mention that Complainant booked the said apartment on 19.02.2011 and enter into the Apartment Buyer agreement on 11.02.2013. The Complainants were lured into



paying Rs. 42,26,246/within a short time. This amount constituted more than 100% of the total sum taken from the Complainants within 5 years. This amount was taken by the Respondent through fraudulent means by erecting a bare structure within 2015. The Respondent declined to complete the Project after collecting money and there has been little progress in construction from 2015 onwards. This indicates the nefarious design of the builder to take about more than 100% of the total sum from complainant through false promises and threats and stopped doing work on the said project after collecting money, which is illegal and arbitrary.

- h. 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 is not in breach of any of its terms of the Agreement.
- i. That Complainant has paid all the instalments timely and deposited Rs. 42,26,246/- that respondent 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 a advance Rest 60% amount linked with the construction of super structure only of the total sale consideration to the time lines, which is not depended or correlated to the finishing of flat and Internal development of



facilities amenities and after taking the same respondent have not bothered to any development on the project till date as a whole project not more than 50 % and in term of particular Tower just built a super structure only. Extracted the huge amount and not spend the money in project is illegal and arbitrary and matter of investigation.

- j. That complainant entered Apartment Buyer Agreement on 11.02.2013 and as per Apartment Buyer Agreement, Respondents/ Builder are liable to offer possession on before 11.02.2016. That as the delivery of the apartment was due on 11.02.2016 which was prior to the coming into of force of the GST Act, 2016 i.e. 01.07.2017, it is submitted that the Complainant is not liable to incur additional financial burden of GST due to the delay caused by the Respondent. Therefore, the Respondent should pay the GST on behalf of the Complainant but just reversed builder collected the GST from complainants and enjoy the input credit as a bonus, this is also matter of investigation.
- k. That The respondent has indulged in all kinds of tricks and blatant illegality in taking money through booking and drafting of Apartment Buyer Agreement with a malicious and fraudulent intention and caused deliberate and intentional huge mental and physical harassment of the complainant and his family.
- l. That due to the malafide intentions of the respondent and non delivered of the flat unit the complainant has accrued huge losses



on account of the future of the complainant and their family are rendered dark as the planning with which the complainant invested his hard earned monies have resulted in sub-zero results and borne thorns instead of bearing fare fruits. Due to delay in possession complainant has incurring huge financial and mental harassment month after month Complainant visited respondent's office several times and requested for possession but the respondent did not bother to respond till date.

- m. That keeping in view the snail paced work at the construction site and half-hearted promises of the Respondent, the chances of getting physical possession of the assured unit in near future seems bleak and that the same is evident of the irresponsible and desultory attitude and conduct of the Respondent, consequently injuring the interest of the buyers including the Complainants who have spent his entire hard earned savings and taken interest bearing loan in order to buy this home and stands at a crossroads to nowhere. The inconsistent and lethargic manner, in which the Respondent conducted its business and their lack of commitment in completing the Project on time, has caused the Complainant great financial and emotional distress and loss.

C. Reliefs sought by the complainant

4. The complainant is seeking the following relief:
- a. Direct the respondent to deliver the physical possession of the unit to the complainant after receiving OC.



- b. Direct the respondent to pay delay possession charges on amount paid.
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. The respondent has contended the complaint on the following grounds:
- a. That the present complaint is not maintainable qua the answering Respondent as the complaint is totally false, frivolous and devoid of any merits against the answering Respondent. The complaint under reply is based on pure conjecture. Thus the present complaint is liable to be dismissed on this ground alone.
- b. That the present complaint is not maintainable as this Authority has no jurisdiction to hear the cases of paying a penalty on the existing deposit of the amount with the answering Respondent once the builder buyer agreement already provides for such an exigency.
- c. That the complainants had approached the answering Respondent for booking a flat no. K 0306 in an upcoming project Estella, Sector 103, Gurugram. Upon the satisfaction of the complainant regarding inspection of the site, title, location plans, etc. an agreement to sell dated 11.02.2013 was signed between the parties.



- d. That the current dispute cannot be governed by the RERA Act, 2016 because of the fact that the builder buyer agreement signed between the complainant and the answering Respondent was in the year 2013. It is submitted that the regulations at the concerned time period would regulate the project and not a subsequent legislation i.e. RERA Act, 2016. It is further submitted that Parliament would not make the operation of a statute retrospective in effect. That the complaint specifically admits to not paying necessary dues or the full payment as agreed upon under the builder buyer agreement. It is submitted that the complainant cannot be allowed to take advantage of his own wrong.
- e. That even if for the sake of argument the averments and the pleadings in the complaint are taken to be true, the said complaint has been preferred by the complainant belatedly. The complainant has admittedly filed the complaint in the year 2022 and the cause of action accrue on 11.02.2013 as per the complaint itself. Therefore, it is submitted that the complaint cannot be filed before the HRERA Gurugram as the same is barred by limitation.
- f. That even if the complaint is admitted to be true and correct, the agreement which was signed in the year 2012 without coercion or any duress cannot be called in question today. It is submitted that the builder buyer agreement provides for a penalty in the event of a delay in giving possession. It is submitted that clause 35 of the said agreement provides for Rs. 5/ sq. ft. per month on super area



for any delay in offering possession of the unit as mentioned in Clause 30 of the agreement. Therefore, the complainant will be entitled to invoke the said clause and is barred from approaching the Hon'ble Commission in order to alter the penalty clause by virtue of this complaint more than 10 years after it was agreed upon by both parties.

- g. That the complaint itself discloses that the said project does not have a RERA approval and is not registered. It is submitted that if the said averment in the complaint is taken to be true, the Hon'ble Authority does not have the jurisdiction to decide the complaint.
- h. That the Respondent had in due course of time obtained all necessary approvals from the concerned authorities. It is submitted that the permit for environmental clearances for proposed group housing project for Sector 103, Gurugram, Haryana on 20.02.2015. Similarly, the approval for digging the foundation and basement was obtained and sanctions from the department of mines and geology were obtained in 2012. Thus, the Respondents have in a timely and prompt manner ensured that the requisite compliances be obtained and cannot be faulted on giving delayed possession to the Complainant.
- i. That the answering Respondent has adequately explained the delay. It is submitted that the delay has been occasioned on account of things beyond the control of the answering Respondent. It is further submitted that the builder buyer agreement provides for such eventualities and the cause for delay



is completely covered in the said clause. The Respondent ought to have complied with the orders of the **Hon'ble High Court of Punjab and Haryana at Chandigarh in CWP No. 20032 of 2008, dated 16.07.2012, 31.07.2012, 21.08.2012.** The said orders banned the extraction of water which is the backbone of the construction process. Similarly, the complaint itself reveals that the correspondence from the Answering Respondent specifies force majeure, demonetization and the orders of the Hon'ble NGT prohibiting construction in and around Delhi and the COVID-19 pandemic among others as the causes which contributed to the stalling of the project at crucial junctures for considerable spells.

- j. That the answering respondent and the complainant admittedly have entered into a builder buyer agreement which provides for the event of delayed possession. It is submitted that clause 31 of the builder buyer agreement is clear that there is no compensation to be sought by the complainant/prospective owner in the event of delay in possession.
- k. That the answering Respondent has clearly provided in clause 35 the consequences that follow from delayed possession. It is submitted that the Complainant cannot alter the terms of the contract by preferring a complaint before the Hon'ble HRERA Gurugram. That the answering Respondent has not appreciated the fact that the downward spiral in property prices has propelled him to file a complaint before the HRERA, Gurugram.

E. Jurisdiction of the authority

7. 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 on the objections raised by the respondent:

F.1 Objections regarding force majeure circumstances.

11. The respondents-promoter has raised the contention that the construction of the tower in which the unit of the complainant is situated, has been delayed due to force majeure circumstances such as orders passed by National Green Tribunal to stop construction, demonetization, and Covid- 19. The plea of the respondent regarding various orders of the NGT and demonetisation and all the pleas advanced in this regard are devoid of merit. The orders passed by NGT banning construction in the NCR region was for a very short period of time and thus, cannot be said to impact the respondent-builder leading to such a delay in the completion. Thus, the promoter respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

F. II. Objection regarding delay in completion of construction of project due to outbreak of Covid-19.

12. The Hon'ble Delhi High Court in case titled as **M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (1) (Comm.) no. 88/2020 and LAS 3696-3697/2020 dated 29.05.2020 has observed as under:**

69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself."

13. In the present case also, the respondents were liable to complete the construction of the project and handover the possession of the said unit by 15.12.2017. It is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non-performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period cannot be excluded while calculating the delay in handing over possession.

F. Findings of the authority on relief sought by complainant.

F.I. DPC & Possession.

14. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges along with interest on the amount paid. Clause 30 of the flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below: -

*"31. The developer shall offer possession of the unit any time, **within a period of 36 months from the date of execution of the agreement or within 36 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later** subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 31. Further, there shall be **a grace period of 6 months allowed to the developer over and above the period of 36 months as above in offering the possession of the unit.**"*

15. At the outset, it is relevant to comment on the present 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 complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoters and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters 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 promoters are 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.

- 16. Admissibility of grace period:** The promoter has proposed to hand over the possession of the subject unit within a period of 36 months from date of agreement or the date of commencement of construction whichever is later plus grace period of 6 months. As no approval/sanction has been placed on record by the respondent therefore, the due date of possession has been calculated from date of execution of builder buyer agreement i.e., 11.02.2013. The period of 36 months expires on 11.02.2016. 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, accordingly the due date of possession comes out to be 11.08.2016.
- 17. 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.

18. 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.
19. 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., **03.01.2024** is 8.85%. Accordingly, the prescribed rate of interest will be MCLR +2% i.e., 10.85%.
20. The definition of term 'interest' as defined under section 2(za) 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:

"(za) "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;"

21. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., **10.85%** by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
22. 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 builder buyer agreement. That the BBA was executed between the parties on 11.02.2013, so the authority calculated the due date from the date of builder buyer agreement i.e., 11.02.2013. The period of 36 months expired on 11.02.2016. 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 11.08.2017. The respondent has not offered the possession of the subject unit till date. It is the failure of the respondent /promoter to fulfil its obligations and responsibilities as per the builder buyer's 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 no.1 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., 11.08.2016 till actual handing over of possession or offer of possession plus two months after obtaining occupation certificate from the competent authority whichever is earlier, as per section 18(1) of the Act 2016 read with Rule 15 of the Rules.

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 interest at the prescribed rate of 10.85% p.a. for every month of delay from the due date of possession i.e., 11.08.2016 till actual handing over of possession or offer of possession plus two months after obtaining occupation certificate from the competent authority whichever is earlier, as per section 18(1) of the Act 2016 read with Rule 15 of the Rules.
 - b. The arrears of such interest accrued from 11.08.2016 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., 10.85% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delay possession charges as per section 2(za) of the Act.
 - e. 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.

(Ashok Sangwan)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 03.01.2024