

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

Complaint no. : 1565 of 2018
First date of hearing : 20.02.2019
Date of decision : 11.09.2019

Mr. Kedar Singh Bhadauria,
R/o F-46, Mansarovar Garden,
New Delhi- 110015.

Complainant

Versus

M/s Ansal Housing and Construction Ltd.
(Through its managing director)
Regd. office: 606, 6th Floor UGF,
Indra Prakash Building, 21
Barakhamba Road, New Delhi: 110001

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

**Member
Member**

APPEARANCE:

Shri Kedar Singh Bhadauria Complainant in Person
Shri Suraj Kumar Singh Advocate for the complainant
Shri Deepankar Dutt Sharma Advocate for the respondent

ORDER

1. A complaint dated 05.11.2018 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. Kedar Singh Bhadauria, against the promoter M/s Ansal Housing and

AUTHENTICATED
GURBACHAN KAUR
LEGAL OFFICER



Construction Ltd. (through its director/authorized representative), on account of violation of clause 31 of apartment buyer's agreement executed on 24.06.2013 in respect of unit described below for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act ibid.

2. Since, the apartment buyer's agreement has been executed on 24.06.2013 i.e. prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.

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

1.	Name and location of the project	"Ansals Highland Park", village Tikampur, Sector 103, Gurugram, Haryana.
2.	Nature of the project	Group housing colony
3.	Project area	11.7 acres



4.	Registered/not registered	Registered vide no. of 16 of 2019 dated 01.04.2019
5.	Registration Valid Upto	30.11.2021
6.	DTCP license no.	32 of 2012
7.	Date of booking	15.05.2012
8.	Date of execution of apartment buyer's agreement	24.06.2013
9.	Unit no.	ABDEN-0502
10.	Unit area	2670 sq. ft.
11.	Payment plan	Construction linked plan
12.	Total consideration amount	Rs.1,16,30,922/- as per payment plan at 68 of complaint
13.	Total amount paid by the complainant till date	Rs. 1,16,30,915/- as alleged by the complainant in complaint
14.	Due date of delivery of possession (as per clause 31 of apartment buyer's agreement i.e. 48 months from date of execution of agreement or within 48 months from the date of obtaining all the required sanctions+ 6 months of grace period)	24.12.2017 Note: The due date is calculated from the date of execution of agreement i.e. 24.06.2013, as there is no document regarding required sanctions.
15.	Delay in handing over possession from due date of possession till date of decision i.e. 11.09.2019	1year 8 months 18 days
16.	Penalty 37 clause as per apartment buyer's agreement	Rs. 5/-per sq. ft. per month on super area

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainant and the respondent. An apartment buyer's agreement dated 24.06.2013 is available on record for the aforesaid unit. As per clause 31 of the apartment buyer's agreement dated 24.06.2013, the due date of handing over possession was 24.12.2017. The respondent has neither deliver the possession of the said unit nor paid any interest for the period it delayed in handing over the possession. Therefore, the promoter has not fulfilled their committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. The case came up for hearing on 20.02.2019, 16.04.2019, 08.05.2019, 29.05.2019, 18.07.2019, 13.08.2019 and 11.09.2019. The reply has been filed on behalf of the respondent and the same has been perused.

Brief facts

6. The complainant submitted that the respondent represented and assured the complainant that the project would be

developed in timely and delivery of the constructed apartment will be made within stipulated timeline. He booked a flat bearing no. ABDEN-0502 in tower Aberdeen at 5th floor in the project "Ansal Highland Park".

7. The complainant submitted that in pursuance of the payment of booking amount, an apartment buyer's agreement dated 24.06.2013 was executed between the respondent and him.
8. The complainant submitted that he made sure that all the instalments are paid within stipulated timeline, however, whenever there was any default in the payment, he compensated the same by paying Rs. 1,58,136/- as penal interest at very heavy interest rate. Further, submitted that he paid all the instalment along with penal interest till date which is amounting to Rs. 1,16,30,915/-. He always believed that the respondent would also stick by its commitment much like him and would hand over the possession within stipulated timeline mentioned in clause 31 of apartment buyer's agreement dated 24.06.2013 i.e. within 48 months from the date of execution of agreement. The respondent failed to give possession by June 2017, however, the respondent failed to deliver the possession. He waited for the possession after the lapse of extension period of six months taken by the respondent i.e. by

December 2017. However, the respondent again failed to stick with its promise and failed to deliver the possession.

9. The complainant submitted that he decided to visit the construction site in order to examine the progress of the project in the month of August 2018 and there was no serious progress to the project.
10. The complainant submitted that he was also informed by the respondent that the project was not even registered with HRERA as the license got expired due to non-payment of EDC charges and buyers including him have already paid EDC charges in the year 2014. Hence, it appears that the respondent has either diverted the funds collected from the buyers to some other project or has illegally embezzled the funds.
11. The complainant submitted that he finally realized that the respondent has no desire to deliver the possession in near future or to pay compensation for delay in possession, he sent a detailed demand notice dated 25.09.2018 to the respondent requesting it to make the payment of compensation for delay in possession from 24.06.2017 onwards. Respondent completely ignored and didn't even bother to send a reply to said notice.

12. The complainant submitted that the respondent has charged heavy penal interest for delay in payment from him. There are numerous judgements of Supreme Court and NCDRC wherein they held that penal interest applicable to builder and the customer should be the same in case of default or breach of the terms of the apartment buyer's agreement.

Issue to be decided

- i. Whether the respondent has violated the terms of the apartment buyer's agreement dated 24.06.2013 entered with the complainant?
- ii. Whether the respondent has misled and misrepresented to the complainant regarding the timeline delivery of the flat bearing no. ABDEN-0502 as well as the status of the project?
- iii. Whether the respondent has imposed heavy penal interest @ 24 % p.a. arbitrarily against the complainant without reciprocating the same rate of interest in case of delay in handing over of possession?
- iv. Whether the respondent is liable to pay penalty under section 61 of RERA Act, 2016 for violating the provisions of RERA Act, 2016 including section 11 and section 12?

Relief sought by the complainant

- i. Direct the respondent to pay interest at prescribed rate on the consideration amount that is Rs.1,16,30,916/- from 24.06.2017 onwards till its realization towards the failure to deliver the possession within the stipulated as agreed under apartment buyer's agreement.

Respondent reply:

13. The respondent submitted that the land of the project is owned and possessed by the respondent through its subsidiary M/s Identity Buildtech Pvt. Ltd. and M/s Agro Gold Chemical Ltd.. It is also worthwhile to mention here that the respondent is under process for registration of the project with RERA which is pending.
14. The respondent submitted that the complaint is highly misplaced, misconceived and is not maintainable or tenable under the eyes of law.
15. The respondent submitted that without prejudice to the aforesaid and the rights of the respondent, it is submitted that the respondent would have handed over the possession to the complainant within time had there been no force majeure circumstances beyond the control of the respondent. There

had been several circumstances which were absolutely beyond and out of control of the respondent such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana High Court duly passed in civil writ petition no. 20032 of 2008 whereby ground water extraction was banned in Gurgaon; orders passed by NGT whereby mining of sand in Haryana and Rajasthan was banned, reservation agitation in Haryana; orders of NGT to stop construction to prevent emission of dust in the month of April 2015 and again in November 2016; demonetization etc. adversely effected the progress of the project. The respondent would pay the complainant appropriate compensation as per the terms and conditions of the said allotment letter duly executed by the complainant.

16. The respondent submitted that the project related to the present complaint has not yet been registered with RERA and as such the hon'ble authority lacks jurisdiction to entertain the present complaint.
17. The respondent submitted that the complainant has opted for construction link plan and like several other buyers, he also defaulted and was always irregular in paying the instalments and as the project could be jeopardized and in order to save

the interest of other buyers, the complainant had also paid the interest on his defaults.

18. The respondent submitted that no cause of action has arose against the respondent as in terms of the RERA Act, the developer has changed the completion date and has undertaken to complete the project on or before 30.11.2021. Hence, on this ground alone, the complaint is liable to be dismissed.
19. The respondent submitted that the complaint is not maintainable and the same is liable to be dismissed on the ground that the complainant seeked suitable interest and compensation, which falls under the ambit of adjudicating officer and not this hon'ble authority.
20. The respondent denied that the complainant made all payments as per construction linked plan. The clause 31 is a matter of record but shall be read as a whole and the force majeure should not be avoided.
21. The respondent denied that the complainant visited the construction site found no construction progress and only 6 workers were casually working. It is further wrong, false and hence denied that the project was far away from completion and even half of the total construction was not completed.

22. The respondent submitted that it is also wrong, false and hence denied that the respondent has diverted the funds collected from the buyers to some other projects or has illegally embezzled the funds. On the contrary, it is due to the force majeure that the project was not completed in the prescribed time.
23. The respondent further submitted that the defaults and irregularity in paying the installments leads to jeopardized project and in order to save the interest of other buyers, the interest on the defaults is necessary. It is also pertinent to mention that the respondent used to waive the interest in genuine cases. The clause 24 of the agreement is a matter of record. The judgments of Supreme Court and NCDRC are not reproduced in the complaint but it is specifically submitted that there is no relief in any court of law whosoever defaulted in the installments.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:

18. With respect to **issue no. 1 and 2** raised by the complainant, as per clause 31 of the apartment buyer's agreement, the



respondent was under obligation to deliver the possession of the unit within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanction and approval necessary for commencement of construction whichever is later and there shall be a grace period of six months allowed to the developer over the above the period of 48 months. The relevant clause is reproduced as under:

"the developer shall offer possession of the unit any time, within a period of 48 months from the date of execution of the agreement or within 48 months from the date of obtaining all the required sanction and approval necessary for commencement of construction whichever is later and there shall be a grace period of six months allowed to the developer over the above the period of 48 months as above in offering the possession of the unit."

19. Accordingly, the due date of possession (on calculation from the date of agreement as there is no document regarding required sanctions) comes out to be 24.12.2017. However, the respondent has failed in handing over the possession on or before the said due date, thereby breaching the terms and conditions stipulated in the apartment buyer's agreement. Thus, the promoter has failed to fulfil his obligation under

section 11(4)(a) of the Real Estate (Regulation and Development) Act, 2016. The complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.60% per annum w.e.f 24.12.2017 till offer of possession as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016.

20. With respect to **third issue** raised by the complainant delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of the super area of the unit for the period of delay beyond 48 + 6 months as per clause 31 of buyer's 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 as also held in para 181 of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (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."

However, on account of failure in handing over possession on the due date, the respondent is liable to pay delayed possession interest at the prescribed rate of 10.60% per annum.

21. With respect to the **fourth issue**, the apartment buyer's agreement was executed on 24.06.2013, prior to the RERA, 2016 and penal provisions cannot be applied retrospectively.

Findings of the authority

22. **Jurisdiction of the authority**-The authority has complete jurisdiction to decide the complaint in regard to 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. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Department of Town and Country Planning, 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.

23. The complainant made a submission before the authority under section 34(f) to ensure compliance of the obligations cast upon the promoter under section 11 of the Act *ibid*.
24. The complainant requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions of the Act and to fulfil its obligations.
25. The complainant reserves his right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required.
26. A team of Local Commissioner comprising of three engineer executive, namely, Nikhil, Satyajeet and Sumeet was appointed to visit the spot and find out whether the construction work is going on at the site or not.
27. Report of Local Commissioner dated 29.8.2019 received and the same is placed on record. The relevant part of the report of LC is as under:-

“The site was physically inspected and it was observed that around 50-60 labour force were working at the site and the work progress is very slow. The

conclusion is based upon the actual construction at site
and it is concluded that:

- a. Overall work progress of the project is 35-40 per cent only.
- a. Overall progress of the complainant's tower is 50-55 per cent only
- b. Overall progress of complainant's unit is 60-65 per cent only.

The documents which are provided by the respondent at the time of registration shows 60 per cent completion of the project. However, after the site visit, it is found that the overall work progress of the project is only 35-40 per cent till date”.

The delayed possession charges have already been granted to the complainant by this authority vide order dated 18.7.2019, so this complaint stands disposed of accordingly.

The order dated 18.07.2019 has been reproduced as under:-

Arguments heard.

As per clause 31 of the apartment buyer's agreement dated 24.6.2013 for unit no.ABDEN-0502 in project “Ansal Highland

Park” sector-103, Gurugram, possession was to be handed over to the complainant within a period of 48 months from the date of execution of apartment buyer’s agreement + 6 months grace period which comes out to be 24.12.2017. However, the respondent has failed to deliver the unit in time to the complainant. Complainant has already paid Rs.1,16,30,915/- to the respondent. As such, complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.60% per annum w.e.f 24.12.2017 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.

Directions of the authority


28. After taking into consideration all the material facts as adduced and produced by complainant, 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 the respondent in the interest of justice and fair play:
- i. The respondent is directed to pay the interest at the prescribed rate i.e. 10.60% for every month of delay from

the due date of possession i.e. 24.12.2017 till the offer of the possession by the respondent.

- ii. The arrears of interest accrued 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 the delayed period.
- iv. The promoter shall not charge anything from the complainant which is not part of the apartment buyer's agreement.
- v. Interest on the due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.60% by the promoter which is the same as is being granted to the complainant in case of delayed possession.

30. The order is pronounced.

29. Case file be consigned to the registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 11.09.2019

Judgement uploaded on 15.10.2019


(Subhash Chander Kush)

Member

