

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

Complaint no. : 2094 of 2019
First date of hearing : 04.09.2019
Date of decision : 04.09.2019

Ms. Ishwer Devi Chhabra
R/o: H. No. 1184/1, 1st Floor, Arjun Nagar, Kotla
Mubarakpur, New Delhi-110003 **Complainant**

Versus

M/s Ansal Housing & Construction Ltd.
(through its Chairman/Managing Director)
Also at: 15 UGF, Indra Prakash, 21, Barakhamba
Road, New Delhi-110001 **Respondent**

CORAM:

Dr. K.K. Khandelwal **Chairman**
Sh. Samir Kumar **Member**
Sh. Subhash Chander Kush **Member**

APPEARANCE:

Sh. J.M. Chhabra **Husband of complainant in person**
Mrs. Meena Hooda **Advocate for respondent**

ORDER

1. A complaint dated 14.05.2019 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 Ms. Ishwer Devi Chhabra, against the promoter M/s Ansal Housing &

Construction Ltd. (through its Chairman/Managing Director), on account of violation of clause 31 of the flat buyer's agreement executed on 05.10.2013 in respect of apartment described below in the project 'Ansal Heights 86', Sector 86, Gurugram for non-fulfilment of obligations of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the flat buyer's agreement has been executed on 05.10.2013 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 case are as under: -

Nature of project: Group Housing Colony

DTCP licence no. 48 of 2011 dated 29.05.2011

RERA registration: Not registered

i.	Name and location of the project	"Ansal Heights, 86", Sector-86, Gurugram
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ii.	Project area	12.843 acres (as per agreement pg. 33 of the complaint)
iii.	RERA Registered/ not registered.	Not registered
iv.	Apartment/unit no.	I-1205
v.	Apartment measuring	1360 sq. ft.
vi.	Date of execution of flat buyer's agreement	05.10.2013
vii.	Payment plan	Construction linked payment plan
viii.	Total sale consideration	Rs. 54,90,844/- (As per the payment plan annexed with the agreement on pg. 48 of the complaint)
ix.	Total amount paid by the complainant	Rs. 49,44,415/- (As per the call notice dated 30.06.2015 on pg. 16 of the complaint) Note: No SOA has been annexed in the paper-book
x.	Due date of delivery of possession as per clause 31 of flat buyer's agreement (42 months + 6 months grace period from the date of execution of agreement or from the date of obtaining all the required sanctions and approvals necessary for commencement of construction, whichever is later)	05.10.2017 Note: No building plan approval/environmental clearance/other approvals have been annexed. Therefore, the due date is calculated from the date of agreement i.e. 05.10.2013
xi.	Delay in handing over possession till date of this decision, i.e. 04.09.2019	1 year, 10 months and 30 days
xii.	Penalty clause as per the said flat buyer's agreement	Clause 37 of the agreement i.e. Rs.5/- per sq. ft. per month of the super area for any delay in offering possession.

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4. The details provided above have been checked on the basis of the record available in the case file which has been provided by the complainant and the respondent. A flat buyer's agreement dated 05.10.2013 is available on record for the aforesaid apartment. As per clause 31 of the flat buyer's agreement the possession of the subject unit was to be delivered by 05.10.2017. Neither the respondent has delivered the possession of the said unit till date to the complainant nor it has paid any compensation @ Rs.5/- per sq. ft. per month of the super area of the said villa for the period of delay as per clause 37 of flat buyer's agreement dated 05.10.2013. Therefore, the promoter has not fulfilled its obligation under section 11(4)(a) of the Act *ibid*.
5. Taking cognizance of the complaint, the authority issued notice to the respondent on 15.05.2019 for filing reply and appearance. The case came up for hearing on 04.09.2019 The reply filed by the respondent on 04.06.2019 has been perused by the authority.

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FACTS OF THE COMPLAINT

6. The complainant submitted that on 29.12.2011, she applied to the respondent by signing a prescribed application form for allotment of a flat admeasuring 1360 sq. ft. at the original basic price of Rs. 3,341.65/- per sq. ft., but later builder added car parking of Rs. 3,00,000/- in the total basic price and calculated the per sq. ft. rate of Rs. 3,665.59/- and brought sale price to Rs. 49,46,644/-.
7. The complainant submitted that the developer cannot charge for car parking if provided it in the open without three walls and roof on it or in the basement of the building. It has been termed as common area in the judgement for which he can't charge. The developer may kindly be directed to refund me Rs. 3,00,000/- or revert back to the original cost of booking i.e. 3341.65. This action of builder can be termed as cheating if he does not revert back to the original booking rate of flat.
8. The complainant submitted that as per clause 31 of flat buyer's agreement, the respondent should have offered possession within 42 months from date of signing of agreement or from the date of obtaining all the required sanctions and approvals

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necessary for commencement of construction, whichever is later. Further there shall be grace period of 6 months. Therefore, due date comes out to be 05.04.2017 but the builder is yet to handover the possession. The 6 months grace period is unwanted and cannot be allowed. The builder may kindly be directed to pay interest @10.75% as has been ordered in the judgement in case no. 564/2018 dated 16.01.2019.

9. The complainant submitted that respondent knowing well that he cannot charge the labour cess from buyer as the govt. of India provided that labour cess is to be used exclusively for welfare of labour only who are engaged for the construction of the building. The case arose when the builder charged a sum of Rs. 24,480/- on account of labour cess charges in his demand dated 13.11.2014. Accordingly, the said complainant wrote to Mr. Kukreti, Assistant General Manager of the respondent company about the same. The builder vide his email dated 18.05.2015, informed that in clause 7 of the agreement the amount has to be paid by the allottee.

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ISSUES TO BE DECIDED

10. The complainant has raised the following issues:
- i. Whether or not the respondent has failed to deliver the possession of the flat thereby violating the terms and conditions of the agreement?
 - ii. Whether the car parking charges raised by the respondent are justified?
 - iii. Whether the respondent is justified in recovering labour cess from buyers in violation of BOCW Act, 1996?

RELIEFS SOUGHT

11. The complainant is seeking the following reliefs:
- i. Direct the respondent to refund Rs. 3,00,000/- collected by him as car parking space.
 - ii. Direct the respondent to complete the project and pay delay possession charges at the prescribed rate of interest.
 - iii. Direct the respondent to withdraw Rs. 24,480/- plus interest as demanded by him dated 30.06.2015, on account of labour cess.

REPLY ON BEHALF OF RESPONDENT

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12. The respondent submitted that the present complaint is not maintainable in law or on facts. It is submitted that the present complaint is not maintainable before this hon'ble authority. The complainant has filed the present complaint seeking refund and interest for alleged delay in delivering possession of the unit booked by the complainant. It is respectfully submitted that complaints pertaining to refund, compensation and interest are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "the Act" for short) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017, (hereinafter referred to as "the Rules") and not by this hon'ble authority. The present complaint is liable to be dismissed on this ground alone. Even otherwise, the complainant have no locus-standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the flat buyer's agreement dated 05.10.2013, as shall be evident from the submissions made in the following paragraphs of the present reply.

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13. The respondent submitted that the above said project is related to licence no.48 of 2011 dated 29.05.2011 received



from DGTC, Chandigarh over the land measuring 12.843 acres details of the same are given in flat buyer's agreement, situated within the revenue estate of Village Nawada Fatehpur, Gurugram, which falls within the area of Sector-86, Gurugram, Manesar Urban Development Plan. The building plans of the project has been approved by the DTCP Haryana vide memo no. ZP-781/D/(BS)/2013/50373 dated 03.09.2013.

14. The respondent submitted that the complainant approached the respondent sometime in the year 2012 for purchasing an independent unit in its upcoming residential project "Ansal Heights 86" (hereinafter "the project") situated in Sector 86, village Nawada, Fatehpur, Gurugram. It is submitted that the complainant prior to approaching the respondent, had conducted extensive and independent enquiries regarding the project and it was only after the complainant was fully satisfied with regard to all aspects of the project, including but not limited to the capacity of the respondent to undertake development of the same, that the complainant took an independent and informed decision to purchase the unit, un-influenced in any manner by the respondent.

15. The respondent submitted that thereafter the complainant vide application form dated 31.01.2012 applied/booked to the respondent for provisional allotment of a unit in the project. The complainant, in pursuance of the aforesaid application form, was allotted an independent villa bearing no. I-1205, in tower-I. The complainant consciously and wilfully opted for a construction linked plan for remittance of the sale consideration for the unit in question and further represented to the respondent that the complainant shall remit every instalment on time as per the payment schedule. The respondent had no reason to suspect the bonafide of the complainant. The complainant further undertook to be bound by the terms and conditions of the application form.
16. The respondent submitted that it 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

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petition no. 20032 of 2008 through which the shucking/extraction of water was banned which is the backbone of construction process, simultaneously orders at different dates passed by the Hon'ble National Green Tribunal restraining thereby the excavation work causing air quality index being worse, may be harmful to the public at large without admitting any liability. Apart from these the demonetization is also one of the main factor to delay in giving possession to the home buyers as demonetization caused abrupt stoppage of work in many projects. The payments especially to workers to only buy liquid cash. The sudden restriction on withdrawals led the respondent unable to cope with the labour pressure. However, the respondent is carrying its business in letter and spirit of the builder buyer agreement as well as in compliance of other local bodies of Haryana Government.

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17. The respondent submitted that several allottees, including the complainant, has defaulted in timely remittance of payment of instalment which was an essential, crucial and an indispensable requirement for conceptualisation and

development of the project in question. Furthermore, when the proposed allottees default in their payment as per schedule agreed upon, the failure has a cascading effecting on the operation and the cost for proper execution of the project increase exponentially whereas enormous business losses befall upon the respondent. The respondent, despite default of several allottees has diligently and earnest pursued the development of the project in question and has constructed the project in question as expeditiously as possible. It is further submitted that the respondent had applied for registration with the authority of the said project by giving afresh date for offering of possession, which is up-to 31.03.2021. It is evident from the entire sequence of events, that no illegality can be attributed to the respondent. The allegations levelled by the complainant are totally baseless. Thus, it is most respectfully submitted that the present complaint deserves to be dismissed at the very threshold. In view of the law as laid down by the Hon'ble Bombay High Court in case titled as Neelkamal Realtors Suburban Pvt. Ltd. vs. Union of India published in 2018(1) RCR (c) 298, the liberty to

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the promoters/developers has been given u/s 4 to intimate fresh date of offer of possession while complying the provision of section 3 of RERA Act as it was opined that the said act named RERA is having prospective effect instead of retrospective. Para no. 86 and 119 of the above said citation are very much relevant in this regard.

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 the **first issue** raised by the complainant the authority is of the view that, as per clause 31 of the flat buyer's agreement dated 05.10.2013, the possession of the unit was to be handed over within 42 months plus grace period of 6 months from the date of execution of agreement or the date of obtaining all the required sanctions and approvals necessary for commencement of construction, whichever is later. In the present case, the flat buyer's agreement was executed on 05.10.2013. Therefore, the due date of handing over the

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possession shall be computed from 05.10.2013. The clause regarding the possession of the said unit is reproduced below:

"31. The developer shall offer possession of the unit any time, within a period of 42 months from the date of execution of agreement or within 42 months from the date of 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 32. Further there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of the unit".

Accordingly, the due date of possession comes out to be 05.10.2017. But, as the promoter has not delivered the possession of the subject unit till date, it has failed to fulfil its obligation under section 11(4)(a) of the Act *ibid*.

The delay compensation payable by the respondent @ Rs.5/- per sq. ft. per month of super area for any delay in offering possession of the unit as per clause 37 of apartment 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. 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."

19. As the promoter has failed to fulfil its obligation under section 11(4)(a), the promoter is liable to pay interest to the complainant, at the prescribed rate, for every month of delay till the handing over of possession. Therefore, as per section 18(1) proviso of the Act *ibid* to be read with rule 15 of the Rules *ibid*, the complainant are entitled to get the delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum.
20. With respect to the **second issue** raised by the complainant, the complainant has not given the fact that whether the car parking space is open or three walled, the respondent cannot charge for the open car parking space as the same falls under the definition of common areas.
21. With respect to the **third issue** raised by the complainant, the respondent has charged labour cess @1% of the total construction costs which are not as per the provisions of law

and should not be charged in an extra ordinary manner. As such, labour cess imposed by the respondent are not as per provisions of law which cannot be charged from the complainant and the respondent is directed not to charge such labour cess from the complainant.

FINDINGS OF THE AUTHORITY

22. 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.
23. 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.

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24. As per clause 31 of the flat buyer's agreement dated 05.10.2013 for unit no. I-1205, in the project "Ansal Heights 86", Gurugram, possession of which was to be handed over to the complainant within a period of 42 months from the date of execution of agreement i.e. 05.10.2013 + 6 months grace period which comes out to be 05.10.2017. However, the respondent has miserably failed to deliver the possession of the unit in time even after a lapse of 1 year and 11 months. Complainant has already paid Rs. 49,44,415/- to the respondent against a total sale consideration of Rs. 54,90,844/-. As such, the complainant is entitled for delayed possession charges at the prescribed rate of interest i.e. 10.45% per annum w.e.f. 05.10.2017 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till the actual offer of possession.
25. It has been alleged that respondent has charged labour cess @1% of the total construction costs which are not as per the provisions of law and should not be charged in an extraordinary manner. As such, labour cess imposed by the respondent are not as per provisions of law which cannot be



charged from the complainant and the respondent is directed not to charge such labour cess from the complainant.

DECISION AND DIRECTIONS OF THE AUTHORITY

26. After taking into consideration all the material facts adduced 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:

- i. The complainant is entitled for delayed possession charges at prescribed rate of interest i.e. 10.45% per annum w.e.f. 05.10.2017 as per the provisions of section 18(1) of the Real Estate (Regulation and Development) Act, 2016 till the actual offer of possession.
- ii. Interest on due payments from the complainant shall be charged at the prescribed rate of interest i.e. 10.45% by the promoter which is the same as is being granted to the complainant in case of delayed possession.
- iii. 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


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- possession shall be paid before 10th of each subsequent month.
- iv. Complainant is directed to pay outstanding dues, if any, after adjustment of interest awarded for the delayed period of possession.
- v. The promoter shall not charge anything from the complainant which is not a part of the flat buyer's agreement.
- vi. The respondent is directed not to charge such labour cess from the complainant.
27. As the project is registerable and has not been registered by the promoters, the authority has decided to take suo-moto cognizance for not getting the project registered and for that separate proceeding will be initiated against the respondent. A copy of this order be endorsed to registration branch for further action in the matter.
28. The complaint is disposed off.
29. The order is pronounced.
30. Case file be consigned to the registry.


(Samir Kumar)
Member


(Subhash Chander Kush)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.09.2019

Judgement Uploaded on 19.11.2019

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