



HARYANA REAL ESTATE REGULATORY AUTHORITY PANCHKULA

Website: www.haryanarera.gov.in

Complaint no.:	2543 of 2022
Date of filing:	03.10.2022
Date of first hearing:	29.11.2022
Date of decision:	08.11.2023

1. Rajesh Kumar, S/o Sh. Chandan Singh,
 2. Payal Taya, w/o Sh. Rajesh Kumar Taya
- Both R/o House no.HE-103A, Phase 9,
Sector- 63, SAS Nagar, Mohali, Punjab- 160062

....COMPLAINANT(S)

VERSUS

M/s Konark Rajhans Estates Pvt. Ltd.,
through its Director
Regd. Office: Village Kot, Sector-14, Panchkula
Extension-II, District Panchkula, Haryana.

....RESPONDENT

CORAM: **Dr. Geeta Rathee Singh** **Member**
 Nadim Akhtar **Member**

Geeta Rathee

Present: Adv. Arjun Kundra, counsel for complainant.
Adv. Vivek Sheoran, counsel for respondent through VC.

ORDER (DR. GEETA RATHEE SINGH - MEMBER)

1. Present complaint was filed on 03.10.2022 by complainants under Section 31 of the Real Estate (Regulation & Development) Act, 2016 (for short Act of 2016) read with Rule 28 of the Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

A. UNIT AND PROJECT RELATED DETAILS

2. The particulars of the unit booked by complainants, the details of sale consideration, the amount paid by them and details of project are detailed in following table:

S.No.	Particulars	Details
1.	Name of the project	Asha Panchkula, Sector-14, Panchkula Extention II, village Kot.
2.	Apartment no.	A-801, 8 th floor

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Geeta Rathee

3.	Area	1405 sq. ft.
4.	RERA registered/ not registered	Registered Reg. no.- 173 of 2017 dated 29.08.2017
5.	Date of booking application	22.03.2016
6.	Date of allotment	05.11.2016
7.	Date of Flat/ Apartment Buyer Agreement	05.11.2016
8.	Deemed date of possession as provided in apartment buyer's agreement (36+6)	30.07.2019 As per clause 9, the company contemplates to offer possession of the said apartment to the allottee within a period of 36 months from the receipt of the first instalment against allotment of the said apartment with a grace period of 6 months, subject to Force Majeure circumstances and due to failure of the allottee to pay in time the total sale price and other charges and dues. Note:- The first instalment was made on 30.07.2016 as per receipt attached with the complaint.
9.	Basic sale price	Rs.24,18,005/-
10.	Total sale consideration	Rs.32,65,900/-
11.	Amount paid by complainant	Rs.29,41,820/-
12.	Offer of possession	Not offered

S. Rathee

B. FACTS OF CASE AS STATED IN COMPLAINT:

3. That complainants made a booking application on 22.03.2016 and upon the payment of booking amount they were issued an allotment letter dated 05.11.2016. Vide this allotment, respondent confirmed the allotment of a 3 BHK apartment (corner+ park facing) with flat no.A-0801 on 8th floor. Thereafter, builder buyer agreement was executed on the same date itself i.e. on 05.11.2016 between the complainants and the respondent against basic sale price of Rs.1721 per sq. ft. amounting to Rs.24,18,005/-. The total sale consideration of the said flat was fixed as Rs.32,65,900/- including additional charges towards EDC, IDC and IFMS.
4. That the complainants dispute terms of builder buyer agreement, being arbitrary and consisting of unilateral terms. It is submitted that when complainants protested to such terms, they were threatened with cancellation of allotment and forfeiture of the amount already paid. Thus, seeing the loss of any leverage the complainants signed the builder buyer agreement.
5. That as per clause 9 of builder buyer agreement, possession was to be delivered within a period of 36 months from the date of receipt of first installment against allotment of the said apartment plus a grace period of 6 months from the date of the agreement, unless there is a delay or failure due to force majeure conditions and due to failure of apartment allottee(s) to pay


J. K. Khatwani

in time the total sale price and other charges and dues as mentioned in the agreement or any failure by allottee(s) to abide by all or any of the terms and conditions of the agreement. First installment was made on 30.07.2016, therefore, possession has been due since 30.07.2019 but the respondent has failed to deliver possession in time.

6. That till date, the complainants have made timely payments of Rs.29,41,820/- to the respondent company in the following manner:

Sr. no.	Receipt no.	Receipt date	Amount (Rs.)	Cheque no.	Cheque date
1.	057	30.07.2016	2,52,683/-	18933	30.07.2016
2.	301	21.04.2017	2,40,000/-	9871	20.04.2017
3.	300	21.04.2017	1,39,021/-	666372	20.04.2017
4.	620	23.10.2017	14,44,345/-	RTGS	23.10.2017
5.	787	06.02.2018	2,56,429/-	RTGS	06.02.2018
6.	-	21.03.2018	2,03,114/-	Bank statement	21.03.2018
7.	025	21.08.2021	4,06,228/-	NEFT	21.08.2021
	Total	-	29,41,820/-	-	-

7. That complainant no.1, Sh. Rajesh Kumar suffers from 70% permanent disability in his right leg and his plight is only aggravated by conduct of respondent. Therefore, complainants pray for possession along-with delay

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interest as per Rule 15 of HRERA Rules, 2017 framed under RERA Rules, 2016, on the ground that respondent has not completed the project even after lapse of 8 years from the date of booking and it is not likely to be completed in near future due to mismanagement.

C. RELIEF SOUGHT:

8. In view of the facts mentioned above, the complainants pray for the following relief(s):-

- a) Direct the respondent to deliver immediate possession of the 3BHK apartment of the complainants i.e., A-0801, Floor-8, "Asha Panchkula", Kot Village, Panchkula Extension-2, Sector-14, Panchkula, Haryana admeasuring 1,405.00 sq ft. after due completion and receipt of occupancy/completion certificate along with all the promised amenities and facilities and to the satisfaction of the complainants after removal of any deficiencies and defects; and
- b) Direct the respondent to pay agreed rate of interest i.e., 12% p.a., on the amount already paid by the complainants from the promised date of delivery i.e., 30th July 2019 till the actual physical and legal delivery of possession after receipt of the Occupancy Certificate; and


G. Rathee

- c) Pass an order restraining the respondent from charging any amount from the complainants which do not form part of the apartment buyer agreement dated 5th November 2016 and/or is illegal and arbitrary including but not limited to enhanced charges, cost escalation charges, delay penalty/interest charges, GST charges, VAT charges, Club membership charges etc. whatsoever; and/or
- d) Any other orders/order which the Hon'ble Authority deems fit as per the facts and circumstances of the matter.

D. REPLY:

- 9. The respondent vide their reply dated 01.08.2023, submitted that the captioned complaint is bad in the eyes of law as he never refused to hand over the possession of Apartment no. A0801 booked by complainants in the project "Asha Panchkula" situated at village Kot, Sector-14, Panchkula, Extension-II, Panchkula. The delay in possession is due to unforeseen circumstances that were totally beyond their control which amounts to force majeure condition and hence they are not liable for prayers sought by complainants. The respondent submits that the construction work is presently carried on at full swing at the site of project, Asha Panchkula and respondent would be offering possession of the booked unit in near future to the complainant.



10. That the respondent denies that he was to hand over the possession of the allotted unit by 30.07.2019. It is submitted that as per clause 9 of builder buyer agreement, possession of the apartment was agreed to be handed over within 36 months with a grace period of 6 months from the date of receipt of first instalment which is 30.07.2016 in the present case. Hence the tentative date of possession comes out to be 31.01.2020, however the same was subject to terms and conditions agreed upon in builder buyer agreement. The respondent admits that real estate sector has been affected adversely due to changing rules and regulations and developing laws regarding real estate sector like implementation of demonetization, GST, ban by NGT due to pollution, strikes by labour etc. and then for almost 2 years the construction work was at halt due to Covid-19 pandemic. The respondent submits vide his reply that delay is also due to default committed by the allottees in making timely payments of the instalments and obligation of the government/HUDA to provide necessary infrastructural facilities like electricity, water, sewage and road upto the periphery for the said project. Since the tentative timeline come out to be January, 2020, it was time when Covid-19 pandemic was at its peak and hence delay could not be attributed to the respondent.



11. That the respondent also denies that they have made false and incorrect representations and have not fulfilled the promises and have in any way lured the complainants or have engaged themselves in illegal, arbitrary and unfair-trade practices. The respondent submits that complainant wrongly seeks to proceed on the basis that time was the essence of the contract and consequently, ignores the provisions of clause 9 of the builder buyer agreement, which has to be read in its totality to gauge the intention of the parties, which clearly is not to treat delivery of possession clause as being the essence of the contract.
12. The respondent submits that as per mandate of Constitution Bench of the Hon'ble Supreme Court in the case of *Chand Rani Vs. Kamal Rani 1993-1-SCC-519 (Para 25)* and other decisions namely, *Gomathinayagam Pillai Vs. Palaniswami Nadar 1967-1-SCR-227* and *Govind Prasad Chaturvedi v. Hari Dutt Shastri 1977-2-SCC-539 (Para 5)*, it is held that fixation of period within which contract has to be performed does not make the stipulation as to time, the essence of the contract and when a contract relates to a sale of immovable property, it will normally be presumed that time is not the essence of the contract. Therefore, the respondent submits that no question of refunding arises with any form of interest.


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13. Furthermore, respondent submits that they are ready to settle the issue raised by the complainants amicably through mutual discussion failing which proper proceedings under Arbitration & Conciliation Act could be carried out as per agreed terms and conditions by the parties in clause 30 of builder buyer agreement. Moreover, as per clause 30 of builder buyer agreement, Authority does not have the jurisdiction to entertain the purported consumer complaint as it has been specifically stated/mentioned in the said agreement that all the disputes shall be referred to an arbitrator to be appointed as per provisions of Arbitration and Conciliation Act, 1996 (as amended).
14. Besides this, the respondent asserts that complainant defaulted in making payments due to which an interest amount of Rs.70,484/- became due to be paid on part of the complainant; however, same stands waived off by them on ground of courtesy. The respondent submits that he is ready to refund amount after deduction of the booking amount because the booking amount deserves to be forfeited as per the agreement executed between them as it is complainants who wishes to withdraw from their project.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT:

15. The counsel for complainants reiterated the facts of the case as stated in the complaint. Ld. counsel further submitted that the project is still incomplete,



and respondent is not in a position to complete the project and deliver possession of the same any time soon. Ld. counsel appearing on behalf of respondent admitted the fact that respondent is not in a position to hand over possession in near future and seek further time to complete the construction and deliver the possession of the allotted apartment to the complainants by December, 2024.

16. Ld. counsel appearing on behalf of the complainants submit that they have filed the present complaint seeking relief of possession along-with delay interest from the promised date of delivery after having received no offer of possession since expiry of the deemed date of possession. Ld. counsel for the respondent rebuts to the said claim of the complainant by submitting that the complainants are not entitled to relief of possession as they did not make regular payments to the respondent. Furthermore, while calculating the due date of possession, grace period of 6 months must be considered. Ld. counsel for the respondent further submitted that such period will additionally entitle them to covid-19 grace period allowed by the Supreme court in such cases of construction and delivery of immovable property.
17. Furthermore, ld. counsel for complainants submitted that besides possession and delay interest, complainants are also entitled to compensation @6% beyond the scheduled date of possession. However, ld. counsel for the



respondent rebutted such prayer and stated that this is not an appropriate forum to seek compensation. For purpose of seeking compensation, appropriate forum would be filing case before Adjudicating Officer and not present Authority. Moreover ld. counsel for respondent contended that the relief of interest claimed by complainant during oral arguments is wrong and arbitrary as monthly component of interest is neither prayed for nor claimed in relief clause filed by complainant. He submitted that seeking a general relief is both arbitrary and un-lawful. Thus, what not sought can't be lawfully claimed thereafter.

F. ISSUE FOR ADJUDICATION:

18. Whether complainants are entitled to relief of possession along-with delay interest for delay in handing over the possession in terms of Section 18 of Act of 2016?

G. FINDINGS AND OBSERVATIONS OF THE AUTHORITY

Findings on the objections raised by the respondent with regard to deemed date of possession.

19. As per clause 9 of the apartment buyer agreement dated 05.11.2016, possession of the unit was to be delivered within a period of thirty six (36) months from the date of receipt of first instalment against allotment of the said apartment plus a grace period of 6 months from the date of the



agreement, unless there is a delay or failure due to force majeure conditions or due to failure of apartment allottee(s) to pay in time the total sale price and other charges and dues as mentioned in the agreement or any failure by allottee(s) to abide by all or any of the terms and conditions of the agreement. It is pertinent to note that first installment was received on 30.07.2016; therefore, respondent was liable to deliver possession of said flat by 30.07.2019 (i.e. 36 months from the date of first instalment). Therefore, question arises as to whether any situation or circumstances which could have happened prior to this date due to which the respondent could not carry out the construction activities in the project.

20. Respondent has submitted that there are various reasons that attribute to delay in completion of project such as changing rules and regulations, developing laws regarding real estate sector, implementation of demonetization, GST, ban by NGT due to pollution, default committed by the allottees in making timely payments of instalments and non- fulfilment of obligation of the government/HUDA to provide necessary infrastructural facilities like electricity, water, sewage and road upto the periphery for the said project, and ceasement of construction activities during the COVID-19 period.

A handwritten signature in blue ink, appearing to read "G. Rathee", with a horizontal line underneath the name.

Herein it would be appropriate to address the reasons cited by respondent one by one.

- i. It is an established fact that demonetisation took place on 08.11.2016, and builder buyer agreement was executed on 05.11.2016. It is observed that when complainant/allottees did not deter payment of instalments and respondent received all the payments in time, then the benefit of such demonization cannot be taken when respondent had the money to complete project.
- ii. Secondly, due date of possession was in 2019 i.e. on 30.07.2019 when covid 19 had not even started, and covid 19 lockdown was imposed later in the month of March, 2020. And as far as delay in construction due to outbreak of Covid-19 is concerned Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. vs Vedanta Ltd & Anr. bearing OMP (1) (Comm.) No. 88/2020 and I.A.s 3696-3697/2020* dated 29.05.2020 has observed that:

“69... The past non-performance of the contractor cannot be condoned due to 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 pandemic cannot be used as an excuse for non-performance of a contract for which the deadline was much before the outbreak itself.

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... The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by September, 2019 and is claiming the benefit of lockdown which came into effect on 23.03.2020, whereas the due date of handing over possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, Authority is of view that outbreak of pandemic cannot be used an excuse for non-performance of contract for which deadline was much before the outbreak itself. ”

Therefore, respondent cannot be given the benefit of halt in work due to covid-19 pandemic.

- iii. Thirdly, there is no proof of document placed on record to prove as to when and ban by NGT due to pollution imposed on them, or strikes due to labour, halted their work and hence, can come within the ambit of force majeure circumstances. In absence of such proof, benefit of such circumstances cannot be awarded to respondent builder.
- iv. Fourthly, there is no proof as to default committed by complainants in payment of the instalments and mere averments have been made by respondent builder. Moreover, it is pertinent to note that amount of Rs. 25,35,592/- had already been paid by complainant by 21.03.2018 and there is no demand letter attached which could prove that there has been default in timely payment of such instalments.


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- v. Lastly, in relation to ground that there has been default in fulfillment of obligations by government/ HUDA for providing necessary infrastructural facilities like electricity, water, sewage, and road upto periphery for said project, there is no proof attached. Respondent has merely made statements with respect to force majeure conditions causing delay in construction and handing over the possession.

Therefore respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals/directions due to which the plea of respondent to consider force majeure conditions towards delay caused in delivery of possession is considered to be without any basis and the same is rejected.

21. Therefore, facts set out in the preceding paragraph demonstrate that construction of the project had been delayed beyond the time period stipulated in the apartment buyer agreement. Authority observes that respondent has failed to fulfil its obligation stipulated in BBA dated 05.11.2016. Possession of unit should have been delivered by 30.07.2019. Now, even after a lapse of 3 years, respondent is not in a position to offer possession of the unit since respondent company has yet to receive occupation certificate in respect of the unit. Fact remains that respondent in his written statement has not specified as to when possession of booked unit



will be offered to the complainant. Complainants, however, does not wish to withdraw from the project and is rather interested in getting the possession of his unit. Learned counsel for complainants has clearly stated that complainant wants immediate possession of the apartment. In these circumstances, provisions of Section 18 of the Act clearly come into play by virtue of which while exercising the option of taking possession of the unit, allottee is entitled to interest for the entire period of delay caused, at the rates prescribed. It is observed that respondent in this case has not made any offer of possession to the complainant till date.

22. Authority concludes that complainants are entitled for delay interest from the deemed date i.e.30.01.2020 up to the date on which a valid offer is sent to him after receipt of occupation certificate. As per Section 18 of Act, interest shall be awarded at such rate as may be prescribed. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

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

Explanation.-For the purpose of this clause-

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of


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interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee 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 allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

Rule 15 of HRERA Rules, 2017 provides for prescribed rate of interest which is as under:

“Rule 15: *“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 (NCLR) 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..”

23. Consequently, as per website of the state Bank of India i.e. <https://sbi.co.in>, the highest marginal cost of lending rate (in short MCLR) as on date i.e.



01.11.2023 is 8.75%. Accordingly, the prescribed rate of interest will be MCLR + 2% i.e. 10.75%.

24. Hence, Authority directs respondent to pay delay interest to the complainants for delay caused in delivery of possession at the rate prescribed in Rule 15 of Haryana Real Estate (Regulation and Development) Rules, 2017 i.e. at the rate of SBI highest marginal cost of lending rate (MCLR) + 2 % which as on date works out to 10.75% (8.75% + 2.00%) from the due date of possession i.e. 30.01.2020 till the date of a valid offer of possession.
25. Authority has got calculated the interest on total paid amount from due date of possession i.e. 30.01.2020 till the date of this order i.e. 08.11.2023 which works out to ₹11,26,726 /- and further monthly interest of ₹25,993 /- as per detail given in the table below:

Sr. No.	Principal Amount (in ₹)	Deemed date of possession or date of payment whichever is later	Interest Accrued till 08.11.2023 (in ₹)
1.	2,52,683/-	30.01.2020	1,02,626/-
2.	2,40,000/-	30.01.2020	97,475/-
3.	1,39,021/-	30.01.2020	56,463/-
4.	14,44,345/-	30.01.2020	5,86,612/-

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5.	2,56,429/-	30.01.2020	1,04,147/-
6.	2,03,114/-	30.01.2020	82,493/-
7.	4,06,228/-	21.08.2021	96,910/-
Total:	29,41,820/-	-	11,26,726/-
Monthly interest:	29,41,820/-	-	25,993/-

26. It is pertinent to mention that complainants have claimed to have paid an amount of ₹29,41,820/- which can be proved from the receipts attached with the complaint. It is pertinent to note that the complainants have not attached receipt in relation to amount of Rs.2,03,114/- and have attached statement of account from 01.03.2018 to 31.03.2018 proving the payment of such amount on 21.03.2018. The same is accepted as a proof of payment being not rebutted by the respondent. It is an established fact that admittance is a proof of admission. Therefore, the said payment is proved to be made by the complainant in favor of the respondent and hence eligible to delay interest.

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H. DIRECTIONS OF THE AUTHORITY

27. Hence, Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

(i) Respondent is directed to pay upfront delay interest of ₹11,26,726/- (till date of order i.e. 08.11.2023) to the complainant towards delay already caused in handing over the possession within 90 days from the date of this order and further monthly interest @ ₹ 25,993/- till the offer of possession after receipt of occupation certificate.

(ii) Complainant will remain liable to pay balance consideration amount to the respondent at the time of possession offered to her.

(iii) The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e, 10.75% by the respondent/ Promoter which is the same rate of interest which the promoter shall be liable to pay to the allottees.



(iv) The respondent shall not charge anything from the complainant which is not part of the apartment buyer's agreement.

28. **Disposed of.** File be consigned to record room after uploading on the website of the Authority.


.....
NADIM AKHTAR
[MEMBER]


.....
DR. GEETA RATHEE SINGH
[MEMBER]