

BEFORE S.C. GOYAL, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

Complaint No. : 175/2019
Date of Decision : 16.10.2019

Shri Manish Nema and Ms Deepti Nema
R/o K-402. Shalimar Palms
PIPLIYAHANA, INDORE-452016

Complainants

V/s

1. M/s Ansal Properties and Infrastructure Ltd.
 2. 115, Ansal Bhawan, K G Marg, New Delhi-110001
- Respondent

For Complainant

: Mr Nilopat Shyam, Adv

For Respondent

: None

ORDER

This is a complaint under section 31 of the Real Estate(Regulation and Development) Act, 2016 (hereinafter referred to Act of 2016) read with rule 29 of the Haryana Real Estate(Regulation and Development) Rules, 2017(hereinafter referred as the Rules of 2017) filed by Mr Manish Nema and Deepti Nema for refund of amount deposited with the respondent for booking of a residential flat for a total sum of Rs.54,18,050/- in its project known as "Ansal The Fernhill" in respect of Flat No.0704-B-0401, measuring 1618 sq. ft. situated in Sector 91, Gurugram

Shri Manish Nema
16/10/19

on account of violation of obligations of the promoter under section 11(4)(a) of Real Estate (Regulation and Development) Act, 2016. Before taking up the case of the complainant, reproduction of the following details is must and which are as under:

Project related details		
1.	Name of the project	Ansal The Fernhill,
2.	Location of the project	Sector-91, Gurgaon, Haryana
3.	Nature of the project	Residential (construction link plan)

Unit related details		
1.	Unit No. / Plot No.	F-0704-B-0401,
2.	Tower No. / Block No.	Tower B
3.	Size of the unit (super area)	1618 Sq.Ft
4.	Size of the unit (carpet area)	-DO-
5.	Ratio of carpet area and super area	-DO-
6.	Category of the unit/ plot	Residential
7.	Date of booking	14.09.2011
8.	Date of execution of BBA (copy of BBA be enclosed as annexure 1)	20.07.2013
9.	Due date of possession as per BBA	August, 2018
10.	Delay in handing over possession till date	More than 1 year
11.	Penalty to be paid by the respondent in case of delay of	As per clause 5.3 of BBA

Shri. C. S. D.
16/11/18

	handing over possession as per the said BBA	
Payment details		
1.	Total sale consideration	Rs.54,18,050/-
2.	Total amount paid by the complainants till date	Rs.47,84,119/-

It is the case of the complainants that they were need of a house at Gurgaon and came to know with regard to project of the respondent known by the name of 'Ansal The Fernhill', Sector 91, Gurugram. Relying upon it and reputation of the company, the complainants booked a unit bearing No. F-0704-B-0401, in Tower B on 14.09.2011. It is their case that as per demand of the respondent, they paid a total sum of Rs.47,84,962/- on different dates as mentioned in Annexure C-3 upto 20.02.2017. The flat/unit booked by the complainant was under the scheme of 'Construction Linked Plan'. Despite making payment mentioned above, the respondent failed to perform its part of the contract. The pace of construction at the spot was very slow. It is further a case of the complainant that as per flat buyer agreement dated 20.07.2013 Annexure C-2, the possession of the booked unit was to be delivered within a period of 48 months with an extended period of six months from the date of execution of that agreement. But despite lapse of more than one year, the respondent failed to complete the project and to offer possession of the unit allotted to them. It is their case that they were unnecessarily harassed and mentally tortured. Even, there was unfair practice and breach of contract by the respondent. When despite oral reminders, the respondent failed to deliver the possession of allotted unit to

the complainants, they were left with no other alternative but to file this

Sh. C. K. Singh
16/12

complaint seeking refund of the amount deposited besides interest and other charges.

3. Despite issuance of notice, the respondent failed to put in appearance and, as such, was proceeded against ex-parte vide order dated 01.10.2019 .

4. I have heard the learned counsel for the complainant and also perused the case file.

5. Though before filing of the amended complaint, the case was pending before the learned Authority and various pleas with regard to delay in completing the project, maintainability of the complaint, default in payment of instalments due and reasons beyond its control in not completing the construction for the unit allotted to the complainants were taken but after filing of an amended complaint, no such plea was taken by putting in appearance and no response to the amended complaint was filed. So, pleas taken by the respondent before the learned Authority cannot be taken into consideration. Now, the following issues arise for consideration:

I) Whether the respondent/developer violated the terms and conditions of the BBA/flat buyer agreement?

II) Whether there was any reasonable justification for delay to offer the possession of the allotted unit?

III) Whether the claimants are entitled for refund of paid amount?

6. It is evident from a perusal of the case file that complainants booked a unit measuring 1618 sq. ft. No.0704-0401 in Tower B of ' Ansals The Fernhill', Sector 91, Gurugram on 14.09.2011 and deposited different amounts with the respondent as evident from Annexure C-3. There is Flat Buyer Agreement Annexure C-2 executed between the parties on 20.07.2013

and as per same, the possession of the allotted unit was to be delivered to

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the complainants within a period of 48 months with an extended period of six months from the date of execution of BBA. That period has also expired on 23.08.2018. A further perusal of the documents placed on record by the complainants show that unit was booked by them with the respondent in a construction linked plan. There is nothing on record to show that the complainant did not deposit the due amount with the respondent. Rather, it is proved that respondent failed to honour its commitment to complete the construction of the project within the stipulated period. There is nothing on the record to show the actual progress of the project in which the complainants were allotted the unit. Rather, during the course of arguments, a copy of report of Local Commission dated 26.04.2019 Annexure -L was placed on the file showing the actual construction of the project at 25% only. The Complainants deposited ^{their} ~~his~~ hard-earned money with the respondent with a hope to get the dwelling unit. But despite waiting for more than eight years, they were unable to get the same. So, in such a situation, it is proved that there is delay in handing over the possession of the allotted unit which amounts to deficiency in service. In case **Fortune Infrastructure & Anr Vs Trevor D'Lima & Ors(2018) 5 SCC 442**, it was held by the Hon'ble apex court of the land that a person cannot be made to wait indefinitely for possession of the plot allotted to him and is entitled to seek refund of the amount paid by him alongwith compensation. Though there is clause 5.1 in the flat buyer agreement Annexure C-2 and which bars taking action by the complainants against the respondent but the same is not attracted in the case in hand. A similar question arose for consideration before the Hon'ble apex court of the land in case **Central Inland Water Transport Corporation Limited and Ors Vs Brojo Nath Ganguly and Ors. and others (1986) 3SCC 156** and wherein

it was observed that under:

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16/10

"..... Our judges are bound by their oath to 'uphold the Constitution and the laws'. The Constitution was enacted to secure to all the citizens of this country social and economic justice. Article 14 of the Constitution guarantees to all persons equality before the law and equal protection of the laws. This principle is that the courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties, who are not equal in bargaining power. It is difficult to give an exhaustive list of all bargains of this type. No court can, visualize the different situations which can arise in the affairs of men. One can only attempt to give some illustrations. For instance, the above principle will apply where the inequality of bargaining power is the result of the great disparity in the economic strength of the contracting parties. It will apply where the inequality is the result of circumstances, whether of the creation of the parties or not. It will apply to situations in which he can obtain goods or services or means of livelihood only upon the terms imposed by the stronger party or go without them. It will also apply where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form, or to accept a set of rules as part of the contract, however, unfair, unreasonable and unconscionable a clause in that contract or form or rules may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction

.....These cases can neither be enumerated nor fully illustrated. This court must judge each case on its own facts and circumstances".

Then, it was also observed in case *Pioneer Urban Land & Infrastructure Ltd*

Vs Govindan Raghvan in Civil Appeal No.12238 of 2018 decided on 02.04.2019 by the Hon'ble apex court of the land that the terms of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted lines, on a contract framed by the builder. The contractual terms of agreement dated 20.07.2013 are ex-facie one-sided, unfair and unreasonable. The incorporation of such one-sided clause as mentioned above in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats/plots by the builder. So, in such a situation, the respondent/promoter can not seek to bind the complainant with such one-sided contractual terms. Hence issue

No. I & II are answered accordingly.

Shri C. C. S. S.
16/10

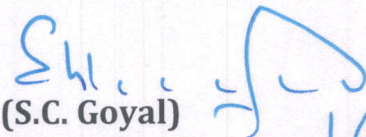
7. Thus, in view of the material facts brought on record, the issue No.III is held in favour of the complainants. Consequently, the following directions are issued to the respondent:

- i) To refund the entire amount of Rs.47,84,119/- alongwith interest at the prescribed rate i.e. 10.35p.a. from the date of each payment till the date the amount is refunded to the complainants in terms of this order
- ii) Respondent shall also pay Rs.20,000/- as compensation inclusive of Rs.5,000/- as cost of litigation to the complainants for mental agony, harassment undergone by them.

8. The payments in terms of this order shall be made by the respondent to the complainants within a period of 90 days from the date of this order.

9. Hence, in view of the discussion detailed above, the complaint stands disposed of.

16.10.2019


(S.C. Goyal)
Adjudicating Officer, 16/10/19
Haryana Real Estate Regulatory Authority
Gurugram