

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

Complaint No. : 277 of 2018
Date of First
Hearing : 17.07.2018
Date of Decision : 13.09.2018

Mr. Om Prakash Kapoor(C1)
Smt. Manvinder Kaur Sahni(C2)
R/o R-1107, Devender Vihar, Near Jalvayu
Towers, Sector-56, Gurgaon, Haryana-
122011
Permanent residence: House no. C-4, Sardar
Nagar, Near C.C. Colony, New Delhi-110009

...Complainants

Versus

Parsvnath Hessa Developers Private
Limited(PHDPL)(R1)
Parsvnath Developers Limited (PDL)(R2)
Registered office: Parsvnath Metro Tower,
Near Shahadra Metro Station, Shahadra,
New Delhi-110032
Corporate Office: 6th floor, Arunachal
Building, 19, Barakhamba Road, New Delhi-
110001

...Respondents



CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar
Shri Subhash Chander Kush

Chairman
Member
Member

APPEARANCE:

Shri Sukhbir Yadav

Advocate for the complainants

Ms. Divya Gupta,
Representative on behalf of
the respondent with Sh.
Sanjeev Jain, MD of the
respondent company

Advocate for the respondents

ORDER

1. A complaint dated 15.05.2018 was filed under section 31 of the Real Estate (regulation & development) Act, 2016 read with rule 28 of the Haryana Real Estate (regulation and development) Rules, 2017 by the complainants Mr. Om Prakash Kapoor and Smt. Manvinder Kaur Sahni, against the promoters Parsvnath Hessa Developers Private Limited and Parsvnath Developers Limited, on account of violation of the builder-buyer agreement executed for unit no.B6-602 in the project "Parsvnath Exotica" for not giving possession on the due date which is an obligation of the promoter under section 11 (4) (a) of the Act *ibid*.

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



1.	Name and location of the project	"Parsvnath Exotica" in sector 53, Golf course road, Gurugram
2.	Unit no.	B6-602
3.	Unit area	3390 sq. ft.
4.	Registered/ not registered	Not Registered
5.	Date of booking	30.06.2010

6.	Date of builder buyer agreement	Copy of BBA not given by the respondent to the complainants
7.	Total consideration	Rs. 2,25,43,500/-
8.	Total amount paid by the complainant	Rs. 1,40,90,234/-
9.	Payment plan	Construction Linked Plan
10.	Date of delivery of possession.	30.12.2012 BBA not enclosed in the file. Aforesaid date is taken in the same pattern as has been taken in other cases in the project, i.e. 24 months from the date of booking + 6 months grace period from the date of booking.
11.	Delay of number of months/ years upto 13.09.2018	5 years 8 months
12.	Penalty clause as per builder buyer agreement	Not disclosed

3. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainants and the respondents. A builder buyer agreement was executed between the parties for Unit No. B6-602 according to which the possession of the aforesaid unit was to be delivered by 30.12.2012. However, the said agreement is not available on record as despite several requests by the complainants, the respondents did not send them a copy of the agreement. Further, the promoter has failed



- to deliver the possession of the said unit to the complainants. Therefore, the promoter has not fulfilled his committed liability as on date.
4. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance. Accordingly, the respondent appeared on 21.03.2018. The case came up for hearing on 17.07.2018, 21.08.2018, 29.08.2018 and 13.09.2018. The reply has been filed on behalf of the respondent.

Facts of the complaint

5. On 30.06.2010, the complainants booked a unit in the project named "Parsvnath Exotica" in Sector 53, Golf Course Road, Gurugram by paying an advance amount of Rs 10,00,000/- to the respondents. Accordingly, the complainants were allotted a unit bearing B6-602 in the township.
6. A builder buyer agreement was entered into between the parties wherein it was assured to the complainants that the possession of the flat will be given within 21 months from the booking. However, till date neither the builder buyer agreement has been handed over to the complainants nor the possession of the said unit has been handed over to the complainants despite making all requisite payments as per the demands raised by the respondents. The complainants made payments of all instalments demanded by the respondent



amounting to a total of Rs 1,40,90,234/-, i.e. amounting to more than 62% amount of the total consideration price.

7. The complainants submitted that at the time of booking, the respondents through their office bearer and agent assured that the possession will be given within 21 months of booking. Thereafter, the complainants paid instalments against the demand and asked for a copy of the builder buyer agreement through mail.
8. The complainants further submitted that the respondents party had demanded 62% payment till 31.10.2012 and the same was deposited by them along with interest and other charges of actual purchase price, but to no avail.
9. The complainants submitted that despite repeated calls, office as well as construction site visits, meetings and emails sent to the respondent, no definite response was shown to timely completion of the project and no appropriate action was taken to address the concerns and grievances of the complainants. Complainants further submitted since 2010, they were regularly writing to the respondents for providing the agreement, but the respondent did not pay any heed, thereby resulting into physical and mental harassment due to the respondents deficiency of services and unfair trade practices.
10. The complainants submitted that as per section 18, RERA Act read with rule 28 of the Haryana Real Estate (Regulations and



Development) Rules, 2017, the respondents are liable to pay the entire amount with interest and compensation.

11. Issues raised by the complainants

- I. Whether there is any reasonable justification for delay to give possession of flats?
- II. Whether there has been deliberate or otherwise, misrepresentation on the part of developers for delay in giving possession?
- III. Whether complainants are entitled to refund of all money paid to the respondents?
- IV. Whether the complainants are entitled to compound interest @ 24% p.a. from date of booking/ January 2010 till date?
- V. Whether complainants are entitled to compensation for mental agony and harassment?

12. Relief sought

- I. To fully refund the amount paid by the complainants amounting to Rs 1,40,90,234/- with interest @ 24% from date of booking till date.



Respondent's reply

13. The respondents submitted that the complaint filed by the complainants is not maintainable and this Hon'ble regulatory authority has no jurisdiction whatsoever to entertain the present complaint. The complaints pertaining to compensation and interest for a grievance under sections 12,

14, 18 and section 19 of the Real Estate (Regulation and Development) Act, 2016 are required to be filed before the adjudicating officer under rule-29 of the Haryana Real Estate (Regulation and Development) Act, 2017 read with section 31 and section 71 of the said Act and not before this Hon'ble authority under rule- 28.

14. The respondents submitted that the present complaint has been filed seeking possession, interest and compensation for alleged delay in delivering possession and refund of the apartment booked by the complainant. Thus, it was further submitted that complaints pertaining to possession, compensation and refund are to be decided by the adjudicating officer under section 71 of the said Act read with rule 29 of HARERA Rules 2017 and not by this authority.
15. The respondents submitted that the respondents have already applied for registration of the project with the RERA authorities vide application dated 23.04.2018 and as per the disclosure in the said application for grant of RERA certificate, the project wherein the present tower is situated will be completed within the time specified therein or granted by the authority. The complaint, if any, is still required to be filed before the adjudicating officer under rule-29 of the said rules and not before this hon'ble regulatory authority under rule-28.
16. Respondents further submitted that that the statement of objects and reasons of the said Act clearly state that the RERA



enacted to protect the interest of investors. As the said Act has not defined the term consumer, therefore the definition of consumer as provided under the Consumer Protection Act, 1986 must be referred for adjudication of the present complaint. The complainants are an investor and not a consumer.

17. The respondents submitted that the complainants have not come to this authority with clean hands and has concealed the material fact that they have been wilful defaulters, having deliberately failed to make the payment of various instalments as and when it became due or the demand raised. The complainants have been negligent since beginning in payment of the instalments.
18. Respondents submitted that they requested the complainants to submit the flat buyers agreement as early as possible but even after several reminders the complainants failed to execute the builders buyers agreement and further failed to pay the amount as and when it became due regarding, as on 06.07.2016, the complainants were in default of Rs.35 lacs approx. and as on the demand of external plaster issued on 20.02.2017, the complainants were in default of Rs.87.39 lacs.
19. It is submitted that the respondent has made huge investments in obtaining approvals and carrying on the construction and development of "Parsvnath Exotica" project and despite several adversities in the process of completing the construction of the project. The delay and modifications, if



any have been caused due to the delay caused by the appropriate govt. authorities in granting the requisite approvals, which act is beyond the control of the respondents. Respondents have been diligently pursuing the matter with various authorities and hence no delay can be attributed to them.

20. The respondents submitted that they are not liable to pay any interest on the refund being claimed by the complainants. It is humbly submitted that, as per the terms of the flat buyers agreement which has not been signed by the complainant, the respondent is not liable to pay any interest to the complainant:

“Clause 5(a) - Timely payment of the instalments/amount due shall be essence of the agreement. If payment is not made within the period stipulated and/or the buyers breach of the terms and conditions of this agreement, then this agreement shall be liable to be cancelled. In the eventuality of the cancellation, earnest money being 15% of the basic price would be refunded without interest. On cancellation of the agreement the buyers shall also be liable to be reimburse to the developer the amount of brokerage paid, if any, by the developer towards the booking of the flat. In any case, all the dues, whatsoever, including interest, if any, shall be payable before taking possession of the flat...”

21. Further, the agreement has provided for the payment of penalty in case the respondent/developer fails to deliver the possession of the flat in question within the time as specified in Clause 10(c). in such circumstances, it cannot be held that time is of the essence of the Agreement.



in Clause 10(c). in such circumstances, it cannot be held that time is of the essence of the Agreement.

22. The Hon'ble Supreme Court in a celebrated decision in the case of *Hind Construction Contractors V/s State of Maharashtra reported in (1979) 2 SCC 70* has laid down the following:

"It will be clear from the aforesaid statement of law that even where the parties have expressly provided that time is of the essence of the contract such a stipulation will have to be read along with other provisions may, on construction of the contract, exclude the interference that the completion of the work by a particular date was intended to be fundamental; for instance, if the contract were to include clauses providing for extension of time in certain contingencies or for payment of fine or penalty for every day or week the work undertaken remains unfinished on the expiry of the time provided in the contract such clauses would be construed as rendering ineffective the express provision relating to the time being of the essence of the contract."

Issues decided



23. Regarding the first issue raised by the complainants, the MD of the respondent company, Sh. Sanjeev Jain submitted that the delay on their part has been due to the beneficiary interest policy (BIP) laid down by the government wherein due to the fault on the part of the licensee company, their project got delayed and such delay was beyond their control. However, despite this contention, there has been an inordinate delay in handing over the possession.

25. In regard to the third issue in the complaint, the respondents submitted before the authority that they will be applying for the RERA registration and the tower in question shall be completed in another 9-12 months time period. Keeping in view the interest of other allottees and the completion of the project, the authority is of the view that the time committed by the respondent must be granted for handing over the possession. Accordingly, refund cannot be allowed at this stage. However, in case of default on the part of the respondent in delivery of possession on the committed date, the complainants will be entitled to claim refund.
26. In regard to the fourth issue raised by the complainants, as the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay to the complainant interest, at the prescribed rate of 10.45%, for every month of delay till the handing over of possession. Section 18(1) is reproduced below:

“18.(1) If the promoter fails to complete or is unable to give possession of an apartment, plot or building,— (a) in accordance with the terms of the agreement for sale or, as the case may be, duly completed by the date specified therein; or (b) due to discontinuance of his business as a developer on account of suspension or revocation of the registration under this Act or for any other reason, he shall be liable on demand to the allottees, in case the allottee wishes to withdraw from the project, without prejudice to any other remedy available, to return the amount received by him in respect of that apartment, plot, building, as the case may be, with interest at such rate as may be prescribed



Findings of the authority

29. **Jurisdiction of the authority-** The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding 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 complainants at a later stage.
30. Keeping in view the present status of the project and intervening circumstances, the authority is of the view that BBA is not enclosed in the file. The due date for possession is taken in the same pattern as has been taken in other cases in the project, i.e. 24 months from the date of booking + 6 months grace period from the date of booking, i.e. 30.12.2012. Shri Krishan Soni, junior draftsman who appeared on 13.09.2018 from the office of STP Gurugram submitted the photocopies of approval of building plans of the project bearing memo no. 3180 dated 10.04.2009 and occupation certificate bearing no. 15958 dated 31.10.2011 and 3254 dated 17.03.2011 and as per the respondent represented by Shri Sanjeev Jain, Managing Director of the respondent company, there are 18 towers out of which 11 are fully developed and occupation certificate has been obtained and possession is offered to buyers and occupation certificate w.r.t. 5 towers has also been applied and w.r.t. remaining 2 towers, they are in the process



in this behalf including compensation in the manner as provided under this Act:

Provided 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 the possession, at such rate as may be prescribed.

27. In regard to fifth issue in the complaint, the complainants can seek compensation from the Adjudicating Officer under the RERA Act.
28. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

“34 (f) Function of Authority -

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.”

The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act which is reproduced below:

“37. Powers of Authority to issue directions-

The Authority may, for the purpose of discharging its functions under the provisions of this Act or rules or regulations made thereunder, issue such directions from time to time, to the promoters or allottees or real estate agents, as the case may be, as it may consider necessary and such directions shall be binding on all concerned.”



fully developed and occupation certificate has been obtained and possession is offered to buyers and occupation certificate w.r.t. 5 towers has also been applied and w.r.t. remaining 2 towers, they are in the process of completing the construction of the project and should be able to complete it by 31.12.2019 as per the date mentioned in the registration application submitted with the registration branch. Thus, in view of the interest of other allottees as well as the endeavour of the authority to get stalled projects completed, the respondent must be granted time to complete the project till the committed date and the complainants must wait till the date committed by the respondent. However, the respondent is bound to give interest at the prescribed rate, i.e. 10.45% on the amount deposited by the complainants for every month of delay on the 10th of every succeeding month from the due date of possession till the handing over the possession of the unit. The respondent is also directed to pay the amount of interest at the prescribed rate from the due date of possession till the date of this order on the deposited amount within 90 days from the day of this order. In case of any default in the handing over of possession, penal consequences may follow and the complainants can approach this authority for redressal of their grievance. Further, the complainants must also complete the payment due on their part.



32. The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondents:

- (i) The respondents are directed to give the physical possession of the said flat to the complainants on the date committed by the respondent for handing over the possession.
- (ii) The respondents are directed to give interest to the complainants at the prescribed rate of 10.45% on the amount deposited by the complainants for every month of delay from the due date of possession, i.e. till 13.09.2018 within 90 days of this order and thereafter on 10th of every month of delay till the handing over of possession.
- (iii) If the possession is not given on the date committed by the respondent in the registration application then the complainants shall be at liberty to further approach the authority for the remedy as provided under the provisions, i.e. section 19(4) of the Act *ibid*.

33. The complaint is disposed of accordingly.

34. The order is pronounced.

35. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.



34. The order is pronounced.
35. Case file be consigned to the registry. Copy of this order be endorsed to the registration branch.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

(Dr. K.K. Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

