

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

Complaint No. : 77 of 2018
Date of First
hearing : 17.04.2018
Date of Decision : 07.09.2018

Mr. Sahib Ram Sehrawat (C1)
Smt. Sunaina Sehrawat (C2)
Mr. Sudhir Sehrawat (C3)
R/o 7 Brook Meadow, Fareham, Hampshire,
PO15 5JH, England
At present: Flat 702, Tower 4, The Close
North, Nirvana Country, Sector-50,
Gurugram-122018, Haryana

...Complainants

Versus

M/s Jasmine Buildmart Private Limited
(Through its Managing Director)
Regd. Office: 406, 4th Floor, Elegance Tower
8, Jasola District Centre, New Delhi-110025

...Respondent



CORAM:

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

Chairman
Member
Member

APPEARANCE:

Complainant in person

Advocate for the complainants

Shri Parmanand Yadav with
Shri S.C.Pandey, Authorised
representative of the company

Advocate for the respondent

ORDER

1. A complaint dated 12.03.2018 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. Sahib Ram Sehrawat, Smt. Sunaina Sehrawat, Mr. Sudhir Sehrawat against the promoter M/s Jasmine Buildmart Private Limited, on account of violation of clause 3.1 of the apartment buyer agreement executed on 14.09.2011 for unit no. 701, 7th Floor, Tower C in the project "Provence Estate" 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	"Provence Estate" in Gwal Pahari Village, Gurugram
2.	Unit no.	701, 7 th Floor, Tower C
3.	Project area	40475.9 sq. mt.
4.	Registered/ not registered	Registered (255 of 2017)
5.	DTCP license	105 of 2008
6.	Date of booking	28.06.2012
7.	Date of apartment buyer agreement	14.09.2012 Note: In the proceeding on 07.09.2018, it was brought to the notice of the Authority that the agreement was executed



		on 14.09.2012 but by mistake it has been recorded as 14.09.2011, which is impossible as the stamp paper was purchased on 07.03.2012.
8.	Total consideration	Rs. 5,10,23,025/-
9.	Total amount paid by the complainant	Rs. 2,60,43,294/-
10.	Payment plan	Possession Linked Plan (PLP)
11.	Date of delivery of possession.	Clause 3.1 – 36 months from date of commencement of construction (June-July 2011) or execution of BBA(14.09.2012), whichever is later+ 6 months grace period i.e. 14.03.2016
12.	Delay of number of months/ years upto 07.09.2018	2 years 5 months
13.	Penalty clause as per apartment buyer agreement dated 14.09.2012	Clause 3.3- 10% per annum of the entire sum paid by purchaser for delay of handing over possession



3. As per the details provided above, which have been checked on the basis of record available in the case file which has been submitted by the complainants and the respondent, an apartment buyer agreement is available on record for unit no. 701, 7th Floor, Tower C according to which the possession

of the aforesaid unit was to be delivered by 14.03.2016. 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 17.04.2018. The case came up for hearing on 17.04.2018, 03.05.2018, 09.05.2018, 07.06.2018, 17.07.2018, 19.07.2018, 02.08.2018, 07.08.2018, 09.08.2018 and 30.08.2018. The reply has been filed on behalf of the respondent on 03.05.2018. A rejoinder was filed by the complainants wherein they reiterated the same facts as the complaint apart from the fact that the respondent published misleading information in the brochure and intentionally hid the fact of existence of Bandhawari Waste Treatment Plant on Gurugram-Faridabad road in the vicinity of the project in question.



Facts of the complaint

5. On 28.06.2012, the complainants who are NRI family's members from England, two of them being senior citizens of 72 years of age booked a unit in the project named "Provence Estate" in Gwal Pahari Village, Gurugram by paying an advance

amount of Rs 2,00,00,000/- to the respondent. Accordingly the complainants were allotted a unit bearing 701, 7th Floor, Tower C.

6. On 14.09.2012, apartment buyer agreement was entered into between the parties wherein as per clause 3.1, the construction should have been completed within 36 months from date of commencement of construction (June-July 2011) or execution of agreement (14.09.2012), whichever is later+ 6 months grace period, i.e. 14.03.2016. However, till date the possession of the said unit has not been handed over to the complainant despite making all requisite payments as per the demands raised by the respondent. The complainants made payments of all instalments demanded by the respondent amounting to a total of Rs 2,60,43,294/-.

7. The complainants submitted that in clause 2.21 of the agreement, an interest @ 24% per annum compounded at the time of every succeeding instalment or 3 months, whichever is earlier, would be charged in case of default in payment plan by the complainants. This is a draconian clause vesting arbitrary power in the hands of the seller/builder to cancel the allotment in case of payments with interest thereon remaining unpaid/due for more than three months. It is further stipulated



in clause 2.10 of the agreement that in case the builder is unable to deliver the apartment to the purchasers because of reasons beyond their control, then the payments made towards sale consideration received from the purchasers will be refunded to the purchasers in full along with the interest rate of 12% per annum. This is an extremely discriminating clause as the seller/builder charges 24% p.a. from the allottees and pays them only 12% interest. This clause is extremely arbitrary, unfair and discriminatory.

8. The complainants submitted that despite repeated calls, meetings and emails sent to the respondent, no definite commitment was shown to timely completion of the project and no appropriate action was taken to address the concerns and grievances of the complainant. In the aforesaid circumstances, the complainants were constrained to visit India again to see the progress and to their shock, they found out that there was only skeleton structure of Tower C wherein the complainants have purchased the apartment in question. The respondent has thus indulged in unfair trade practice, cheating and deficiency in services. Complainant further submitted that given the inconsistent and lack of commitment to complete the project on time, the complainant decided to terminate the agreement.



9. As per clause 3.1 of the apartment buyer agreement, the company proposed to hand over the possession of the said unit by 14.03.2016. The clause regarding possession of the said unit is reproduced below:

"3. Possession

3.1- "..... the seller proposes to handover the possession of the apartment to the purchaser within a period of 36 months from the date of commencement of construction or date of execution of buyer's agreement, whichever is later, subject to force majeure. The purchaser agrees and understands that the seller shall be entitled to a grace period of 6 months, for applying and obtaining the completion certificate/ occupation certificate in respect of the unit and/or the project....."

10. The complainants submitted that the issues raised in the present complaint have been dealt with by the NCDRC in the cases of ***Subhash Chander Mahajan v. Parshnath Developers Ltd., CC No. 144/2011, Swarn Talwal & ors. v. Unitech Ltd. CC No. 348/2014, Navjeet Chabra v. Unitech Ltd. CC No. 1180/2015.***

Issues raised by the complainants

- I. Whether the promoter published incorrect and false information in the brochure and abused and misused the name of Provence in South east of France on the Mediterranean Sea to



attract and misled the complainants and made them to pay huge sum of money to the promoter?

- II. Whether the promoter was ever able to create no matter how much money it spent the ambience of the Provence in South-East France on Mediterranean Sea at Gwal Pahari Village Gurugram therefore guilty of cheating and fraudulent misrepresentation?
- III. Whether the promoter was ever able to deliver the possession in time as time was an essence for possession of the apartment?
- IV. Whether the promoter cheated the complainants by making false representations to them as to the date of delivery of possession and quality of the apartment?
- V. Whether the promoter is liable to pay huge compensation, costs, damages and heavy penalty to the complainants on top of refunding their full principal amount with interest as stipulated in the apartment buyer agreement?



Relief sought

- I. To fully refund the amount paid by the complainant amounting to Rs 2,60,43,294/-
- II. To provide the interest as per the agreement on amount of Rs 2,60,43,294/- from date of receipt till the date of final

settlement.

- III. Compensation for mental harassment, breach of contract, air travel expenses @ Rs 1,50,000/- per year.

Respondent's reply

10. The respondent stated that the present complaint is not maintainable in law or facts as the complainants have not come with clean hands and has concealed true and material facts. The complainants are not an 'allottee' as defined u/s 2(d) of the Act as this section prescribes 'transfer' as the key word in the statute entitling a person to any relief under the Act or making him entitled to the reliefs as prescribed under the Act. In terms of the agreement, the complainants are not a transferee in as much as the property is proposed to be transferred to the intending allottee in terms of the agreement and there is no transfer of the property as such since the customer only becomes entitled to transfer on payment of the total sale consideration. Thus in view of this factual situation the complainant is not an allottee to whom a property is transferred.

11. The respondent submitted that as per the possession linked payment plan, the customer avails a discount of 5% of



the total sale consideration. Thus the complainants have already availed a benefit to the tune of Rs. 25,81,000/-.

12. The respondent submitted that not only has the company completed the super structure of the project but also is at the very end of finishing the project in all respects from its own funds, whereas, the customer has only made a payment of 50% of the total consideration. Further, this authority has after due consideration granted the certificate of registration of this project allowing the company to deliver this project before 31st December, 2018. Such certificate is binding not only upon the company but also upon all the customers of the project as this certificate has been granted by this authority after considering all aspects of the project along with reasons for the proposed commitment date as mention in the application for the registration of the project.

13. Respondent further submits that even though the Act provides for rights to the customers to seek refund in case the project is not delivered in terms of the agreement yet as per the rules once a certificate of registration has been granted and the proposed time lines for delivery has been specified and after due consideration have been allowed by an authority constituted under the Act, then in such case the authority so



would be in consonance with the principle of harmonious construction.

14. Respondent submitted that the time proposed for delivery of possession of the flat in the agreement is merely a proposal and cannot be read as a promise or undertaking by the respondent. It is further submitted that the reasons for delay were beyond the control of the respondent and the delay was due to following reasons:-

a) By an order dated 16.07.2012, Hon'ble High Court of Punjab and Haryana has restricted use of groundwater in construction activity and directed use of only treated water from available seaweed treatment plants. That order coincided with the launch of the project and caused a huge delay in starting project itself and therefore, the respondent could not arrange for ample water to continue pace of construction as promised to all customers and the performance of the project was reduced to less than half up to 13.10.2014 when answering respondent obtained water supply assurance from HUDA.



b) There was a lot of delay on the part of government agencies in providing relevant permissions, licenses approvals and sanctions for project which resulted in advertent delay in the project which constitutes a force majeure condition as

anticipated in clause 11 of the agreement as delay caused in these permissions cannot be attributed to respondent for very reason that respondent has been very prompt in making applications and replying to objections if any raised for obtaining such permissions.

- c) There was an extreme shortage of labour in the NCR during the commonwealth games and due to active implementation of social schemes like NREGA and JNURM.
- d) The Ministry of environment and forest and the Ministry of mines had imposed certain restrictions which resulted in drastic reduction in the availability of bricks and sand which is the most basic ingredient of construction activity.
- e) By notification dated 14.03.2014, the department of renewable energy has introduced new guidelines forcing the opposite party to suddenly create and install 40 KW solar photovoltaic power plant as per the prescribed guidelines.
- f) The demonetization introduced by the current government on 8th Nov, 2016 has severely impacted the operations and project execution on the site as the labours who didn't had bank accounts were only paid by cash by sub-contractors of the company.



Application under Section 8 of The Arbitration And Conciliation Act, 2015 and its reply:-

15. The respondent filed an application submitting that the complainants in the complaint are relying upon the builder buyer agreement existing between the parties and clause 35 of the agreement is a validly existing arbitration agreement between the parties. In context of clause 35 of the buyers agreement as well as sub-section 1 of Section 8 of the Arbitration and Conciliation Act, 2015 the present dispute is liable to be referred to arbitration since it is a mandate of Section 8 that any dispute brought before any judicial authority under any action which is the subject matter of arbitration “shall” be referred to arbitration between the parties.

To this, the complainants submitted that the correct citation is the Arbitration and Conciliation Act, 1996 as amended by the Arbitration and Conciliation(Amendment) Act, 2015 that came into force on 23.10.2015. It is further submitted that the respondent is misguiding the authority and intentionally did not cite the correct law. The correct law is that statutory regime concerning arbitration would not be applicable where public law regime operates. There are certain disputes that were to be adjudicated and governed by statutory enactments, established



for specific public purpose and to sub-serve a particular public policy. Such disputes are non-arbitrable. Arbitration clause between the parties could not circumscribe jurisdiction of the authority and the complainants have legal right to seek remedy and relief from the authority for refund of their money with interest and compensation. The amendment of Sec. 8 of the Arbitration and Conciliation act does not have the effect of nullifying the ratio of catena of judgments of the Hon'ble Supreme Court, particularly in *National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.



Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015*, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.

Issues decided

After considering the facts submitted by the complainants,

reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

16. In respect to the first and second issue raised by the complainants, the facts stated in the complaint are not sufficient to prove fraudulent misrepresentation or any misleading on the part of respondent.

17. In regard to the third issue raised in the complaint, the due date for possession was 14.03.2016 giving all the concessions to the promoter regarding the maximum time allowed for construction as well as grace period. The promoter is not in a position even today to hand over the possession of the apartment/unit. Still the project is incomplete, internal development services in the project are not in place, there are four towers, apartment of the allottee falls in tower-C. The possession of tower no. A and B has not yet been handed over and the construction of tower C was to be completed after the completion of tower A and B. Accordingly, it seems that in the near future the project is not going to be completed. However, the respondent has committed in their RERA registration that the project will be ready for possession by 31.12.2018.



18. In regard to the fourth issue raised in the complaint, the counsel of respondent drew the attention of the authority towards force majeure under clause 11.2 of the agreement. This force majeure clause has been drafted in such a mischievous manner that every kind of delay or lapses by the builder has been covered in it as such. Its ingredients are of no consequence and needs to be obviated. Thus, 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 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. In regard to the fifth issue raised by the complainants, the complainants can seek compensation before the adjudicating officer.
20. As the possession of the flat was to be delivered by 14.03.2016 as per the clause referred above, the authority is of

20. As the possession of the flat was to be delivered by 14.03.2016 as per the clause referred above, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016, which is reproduced as under:

"11.4 The promoter shall—

(a) be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be: Provided that the responsibility of the promoter, with respect to the structural defect or any other defect for such period as is referred to in sub-section (3) of section 14, shall continue even after the conveyance deed of all the apartments, plots or buildings, as the case may be, to the allottees are executed."

21. The complainants makes 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 by the authority under section 37 of the Act ibid to the promoter to comply with the provisions and fulfil obligation 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.

22. The complainants reserve his right to seek compensation from the promoter for which he shall make separate application to the adjudicating officer, if required.

Findings of the authority

23. The preliminary objections raised by the respondent regarding jurisdiction of the authority stands rejected. 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 complainants at a later stage.

24. Keeping in view the present status of the project and intervening circumstances, the authority is of the considered



opinion that the respondent has failed to deliver the possession of the apartment in question to the complainants by the committed date i.e. 14.03.2016 as per the said agreement. However, as per the declaration made by the respondent in their RERA registration application, the date of completion of the project is 31.12.2018. although there has been an abnormal delay in delivery of possession, however, keeping in view the fact that the committed date of possession, i.e. 31.12.2018 is very near, if the respondent is able to get the occupation certificate of tower-C in which the apartment in question falls before the said date, then the complainants will take possession and claim interest for the delayed period at the rate of 10.45% which shall be paid to the complainants within 90 days from the date of decision and subsequent interest to be paid by the 10th of every succeeding month..

Decision and directions of the authority

25. After taking into consideration all the material facts as adduced and produced 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 to the respondent in the interest of justice and fair play:



- (i) The respondent is duty bound to hand over the possession of the said unit by 31.12.2018 as committed by the respondent in the registration application
- (ii) If the respondent fails to hand over the possession by 31.12.2018, within 90 days of the said date, the entire amount shall be refunded to the complainants along with prescribed rate of interest @ 10.45% without any deduction.
- (iii) In case of non-compliance of the order of the authority, the complainant may approach the authority for penal proceedings and for execution of decree against the respondent.

28. The order is pronounced.

39. 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

PROCEEDINGS OF THE DAY

Day and Date	Friday and 07.09.2018
Complaint No.	77/2018 Case titled as Mr. Sahib Ram Sherawat V/s M/s Jasmine Buidmart Pvt. Ltd.
Complainant	Mr. Sahib Ram Sherawat
Represented through	Complainant in person
Respondent	M/s Jasmine Buidmart Pvt. Ltd.
Respondent Represented through	Shri S.C.Pandey authorized representative of the respondent-company with Shri Parmanand Yadav, Advocate.
Last date of hearing	30.8.2018

Proceedings

The project is registered.

The apartment was booked on 28.6.2012 alongwith payment of Rs.2,60,43,294/- as 50% of the sale price of Rs.5,10,23,025/-. There was some error in recording the date of agreement. The agreement was executed on 14.9.2012 but by mistake, it has been recorded as on 14.9.2011 which is impossible as the stamp paper for the agreement was purchased by the promoter on 7.3.2012 as per the stamp affixed on the back of the stamp paper. As per clause 3.1 of the agreement, possession was to be handed over within a period of 36 months from the date of commencement of construction or execution of the agreement which ever is later alongwith

seller being entitled for a grace period of 180 days. Accordingly, the date of handing over of possession comes out to be 14.3.2016 giving all the concessions to the promoter regarding the maximum time allowed for construction as well as grace period. The promoter is not in a position even today to hand over the possession of the apartment/unit. Still the project is incomplete, internal development services in the project are not in place, there are 4 towers, apartment of the allottee falls in tower – C. The possession of tower no. A and B has not yet been handed over and the construction work of tower-C is completed after the completion of tower A and B. Accordingly, it seems that in near future the project is not going to be completed. The counsel for the respondent made a statement that the project will be ready for possession by 31.12.2018. The same date has been given in the application for registration of the project.

The counsel for the respondent has drawn attention of the authority towards force majeure clause 11.2 of the agreement. This force majeure clause has been drafted in such a mischievous manner that every kind of delay or lapses by builder has been covered in it.

If the respondent is able to get occupation certificate of tower-C in which unit No.701 falls before 31.12.2018, then the complainant will take possession and will claim interest of the delayed period.

Counsel for the respondent intimated that date of completion of the project is 31.12.2018 as per the declaration made in the application for registration. Keeping in view that the date of completion is very near but

there is abnormal delay in completing construction of the project and handing over the possession.

After considering the facts and circumstances of the case, authority hereby directs that apartment be handed over before the committed due date, otherwise within 90 days of the completion period of project i.e. 31.12.2018, the amount shall be refunded to the complainant alongwith prescribed rate of interest @ 10.45% without any deduction. In case of non-compliance of the order of the authority, the complainant may approach the authority for penal proceedings and for execution of decree against the respondent. The complaint is disposed of accordingly. Detailed order will follow. File be consigned to the Registry.

Samir Kumar
(Member)

Subhash Chander Kush
(Member)

Dr. K.K. Khandelwal
(Chairman)
07.09.2018