

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

Complaint no. : 4299 of 2019
Date of first hearing : 17.12.2019
Date of decision : 23.02.2021

1. Vimal Chandok
2. Vaishali Chandok
Both R/o 26/4, Ground Floor, DLF Phase-III,
Chakarpur (74), Gurugram-122002

Complainants

Versus

1. Ansal Properties & Infrastructure Ltd.
Regd. Office: 115, Ansal Bhawan, 16,
K.G. Marg, New Delhi-110001

2. Samyak Projects Pvt. Ltd.
Regd. Office: 111, First Floor,
Antriksh Bhawan, 22, K.G. Marg,
New Delhi-110001

Respondents

CORAM:

Dr. K.K. Khandelwal
Shri Samir Kumar

Chairman
Member

APPEARANCE:

Adv. Garv Malhotra
Adv. Gagan Sharma

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 11.09.2019 has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act)



read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottees as per the flat buyer's agreement executed inter se them.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

1.	Name and location of the project	"The Fernhill" in Village Mewka, Sector 91, Gurugram
2.	Project area	14.412 acres
3.	Nature of the project	Residential Project
4.	DTCP license no.	48 of 2010 dated 21.06.2010
	DTCP license validity status	20.06.2016
	Name of licensee	Aravali heights infrastructure pvt. ltd and ors.
5.	HRERA registered/ not registered	Registered vide no. 392 of 2017 [Phase-I] & 389 of 2017 [Phase- II]
	RERA registration valid up to	31.12.2019 [Phase-I] 31.12.2020 [Phase- II]
6.	Date of allotment letter	15.06.2011



		[Page 26 of complaint]
7.	Unit no.	0704-F-0404 [Page 41 of complaint]
8.	Unit area	1348 sq. ft.
9.	Payment plan	Construction linked plan [page 63 of complaint]
10.	Date of execution of flat buyer agreement	10.07.2013 [page 39 of complaint]
11.	Total consideration	Rs. 44,03,131/- [as per customer ledger dated 19.08.2019 at page 71 of complaint and confirmed by respondent on page 4 of reply]
12.	Total amount paid by the complainants	Rs. 37,67,530.81/- [as per customer ledger dated 19.08.2019 at page 77 of complaint and confirmed by respondent on page 4 of reply]
13.	Commencement of construction	14.08.2014 (as per customer ledger dated 19.08.2019 at page 77 of complaint)
14.	Date of delivery of possession. (Clause 5.1 - 48 months + 6 months grace period from date of execution of agreement or commencement of construction whichever is later)	14.02.2019 (Note: Calculated from the date of commencement of construction i.e. 14.08.2014)
15.	Delay in handing over possession till date of decision i.e. 23.02.2021	2 year 9 days

B. Facts of the complaint.

3. The complainants submitted that the respondents launched a new residential project called "THE FERNHILL" in Sector 91, Gurugram, Haryana & had published many advertisements for the project to attract the public at large. An initial Booking amount of Rs 4,00,000 was paid by the complainants to the respondents from 21.04.2011 to 31.08.2011 for the allotment. Further Rs 1,58,961/-, Rs 9,316.53/-, Rs. 3,89,429.17 and Rs 25,182.75 on 04.07.2011, 05.08.2011, 05.08.2011 and 05.08.2011 respectively at the time of allotment. In addition, Rs 26,019.77 as PLC1 towards booking of flat having super area admeasuring 1348 square feet approximately (125.23 Square Meters) and basic sale price (BSP) of Rs 2816 /- per square feet (equivalent to Rs. 261.61 per square meter) plus exclusive right to use the parking space in the project.
4. The complainants further submitted that a flat buyer's agreement was made and executed between the respondents and complainants on 10.07.2013 for flat bearing no: 0704-F 0404 on the 4th floor. The complainants opted for construction linked plan of payment and as per the para 5.1 of the flat buyer's agreement, the possession of the unit was to be handed over within 48 months years, with a six months grace



period thereon from the date of execution of the flat buyer's agreement, i.e., by 10.01.2018.

5. The complainants submitted that on 19.08.2019 the complainants received a ledger by the respondent no. 1/builder reflecting all the payments made and payments due along with customer ledger.
6. The complainants further submitted that they approached the respondents time and again seeking the information and status of the project and date of offer of possession of the said premises. After repeated reminders, the respondents assured that they will handover of possession soon. Moreover, the respondents represented and assured that they will hand over the possession very soon. It is pertinent to note that no offer of possession has been made till date despite all obligations and payments being met with by the complainants in time as and when demanded by the respondents.
7. The complainants stated that the possession is delayed by almost more than one and half years and despite facing serious hardship on account of the delay, the complainants do not wish to withdraw from the project but should be paid delayed possession charges/ interest as prescribed under the Act. The complainants had complied with all the terms and conditions of the flat buyer's agreement, but the respondents failed to



meet up with their part of the contractual obligations and thus liable for compensation for delayed possession from the due date of possession till date. It is pertinent to mention here that the respondents have not honoured their part of commitment and charged interest @24% for each small delay in payment which had been also promptly paid. The flat buyer's agreement provides for payment of Rs 10 per square feet per month for delayed handing over of the flat but it may be noted that this is grossly inadequate and one sided condition which has encouraged the respondents to delay the handover of flat. Till date no amount has been paid back to the complainants and the respondents are enjoying the hard-earned money of the complainants for nearly past more than Eight plus years.

8. That the complainants also submitted that the respondents charged the complainants on Super Built-up area whereas as per the New Act the Basic sale Price is liable to be paid on the Carpet-Area only. This is a clear and blatant violation of the provisions, rules and object of the Act. This is also violation of section 11(4) (a) of Haryana Real Estate (Regulation and Development) Rules, 2017.

C. Relief sought by the complainants:

The complainants have sought following relief(s):

- (i) Direct the respondents being jointly and severally liable to pay the complainants as they are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 10.01.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 offer of possession.
9. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4) (a) of the Act to plead guilty or not to plead guilty.
10. However, despite notice neither respondent no. 2 put in appearance nor filed any reply.

D. Reply by the respondent no.1

Respondent no.1 has filed reply and has contested the complaint on the following grounds.

- i. That instant complaint filed by the complainants is false, frivolous, baseless and nothing but gross abuse of the process of law. It has been filed with the sole purpose of harassing and extracting unlawful gains from the respondent company. It is submitted that the main intent of the legislature in enactment of the RERA Act, 2016 was



to provide relief to aggrieved buyers/customers however, same cannot be misused by wishful buyers/customers to arm-twist the builders into extracting unlawful gains and wriggle out of their contractual liability. Also, before arriving at any decision this Hon'ble Authority is mandated to apply the principle of natural justice and take a just and valid decision on the case at hand.

- ii. The present complaint is liable to be dismissed as the same has been filed without any valid or tenable cause of action. The conduct of the respondent has been in consonance with the terms and conditions agreed between the parties and the complainants are trying to wriggle out of her responsibility by making false and baseless allegations against the respondent company.
- iii. It is submitted that the present complaint has been filed prematurely well before the agreed date for handover of possession of the flat/unit in dispute. That seeing the downturn in the real estate market the complainants are unwilling to make further payments against the provisionally allotted unit and has approached this Learned Authority to extract refund of the deposited amount and other unlawful gains from the respondent company and has filed the present Complaint prior to

arising of any cause of action in its favour or against the respondents.

- iv. That the complainants approached the respondent company in the month of April, 2011 and applied for booking of a unit in the "Fernhill Project" at Gurgaon, Haryana by filing application form dated 20.04.2011.
- v. That based on the representation made by the complainants in the aforesaid application, a flat/unit no.F-0404 in Tower-F, Phase-2 of the Project was provisionally allotted in name of the complainants for a total sale consideration of Rs.44,03,131/- plus GST as applicable and an allotment letter dated 25.08.2011 was duly issued in name of predecessor of the complainants in this regard. Thereafter, a Flat Buyer Agreement ("FBA") dated 10.07.2013 was also executed between the parties stipulating all the relevant terms and conditions. An addendum dated 29.07.2014 was also entered into between the parties.
- vi. That the respondent company in its standard flat buyer agreement, by way of clause 5.1 provided for the timeline for handover of possession of the units to its various buyers. As per said clause 5.1, the handover of the units was to be calculated from the date of execution of the Flat

Buyer Agreement or from the date of commencement of construction of the particular tower/block in which the said unit is situated subject to sanction of the building plan, whichever is later.

- vii. That due to delay in sanctioning of the building plan, license etc, on account of environmental clearance issues, increased FAR and other technical issues, that were beyond the reasonable control of the respondent company, the construction of the Tower-H consisting of the provisionally allotted unit of the complainants commenced sometime later than the date of execution of the FBA. It is pertinent to mention that post issuance of the license for development of the project by the concerned authorities, the respondent also got issued layout plan and zoning plan and the respondent was fully committed to complete the project on time. However, the construction and development activities of the project came to a standstill due to a Government notification wherein the Government notified some part of the project to be covered under newly notified green belt. that due to this environmental notification hindrance the project got delayed and only after great persuasions and follow ups the issue got resolved and respondent could move ahead

with the construction and development work. The license dated 21.06.2010, show cause notice dated 17.05.2013, approval letter dated 04.06.2013 & 03.12.2013, letter dated 03.12.2013 & 27.05.2014, request letter dated 22.07.2014 and environmental clearance letter dated 17.10.2014 were issued for the present matter.

viii. That on the present date the Phase 1 of the project stands almost completed with construction work of Phase 2 also going on at a very fast space. It is submitted that out of total 14 (fourteen) towers, Tower-N and Tower-P along with lift facilities are fully completed and occupancy certificate has also been applied for the same. The structure of the tower F is complete, and the internal/finishing work is going on at a fast pace. The tower is likely to be completed and offered for possession within next six (6) months.

ix. That the handover of possession of the unit to the complainants was also subject to complete payment of the basic sale price and other charges due and payable up to the date of possession according to the payment plan applicable to him/her (Clause 4.3). That timely payment of the instalment amount was the essence of the contract however, the complainants have failed to honour the

same. That out of total sale consideration of Rs.44,03,131/- and GST as applicable for the unit/flat, only a sum of Rs.37,67,530.00 has been received by the respondent.

- x. That the respondent company has also got the project registered under RERA, Haryana as per RERA Guidelines and norms, wherein a RERA registration Certificate dated 22.12.2017 with validity up to 31st December, 2020 for Phase - 2 of the Project has been duly issued in favour of the respondent company. That as per the said RERA Certificate the respondent is liable to complete the said project by the end of December 2020 and handover the units/flats to respective buyers/allottees. That the said RERA registration certificate is also available on the official website of RERA, Haryana.
- xi. It is submitted that it cannot be said that the respondent company has breached any terms or conditions agreed between the parties and that there is any delay in handover of possession of unit to the complainants. That as on the present date the terms of the FBA still subsists and the respondent company is contractually liable, obligated and committed to complete the construction work of the project and handover the possession of the

subject unit complete in all respect to the complainants. That the respondent company has neither violated the terms of the FBA nor the provisions of RERA and even if this Learned Forum adopts either of the above stated two approaches then still the respondent company cannot be held liable for any alleged default/delay in handover of possession of the floor/flat.

- xii. That without prejudice, even if it is assumed but not admitted that there has been some delay in completion of the project attributable to the respondent company then also there is an appropriate mutually agreed alternate remedy provided in said FBA in form of clause 9.12
Clause 9.12.

"That it is clearly agreed and understood that it for any reason, the Company is not in a position to deliver the allotted unit as applied for and agreed hereto, the Company, at its sole discretion, shall consider for delivering any alternative flat in the said residential project....."

- xiii. That the answering respondent has never refused to abide by the contractual obligations on its part and has always acted bonafide and in good faith. There was/is no occasion with the complainants to file the present complaint in absence of any valid or tenable cause of action.

E. Jurisdiction of the authority

E.I Territorial jurisdiction

11. 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.

E.II Subject matter jurisdiction

12. While filing reply, it is contended by the respondent that the complaint filed is not maintainable for the desired relief but he has not pleaded as to how the complaint is not maintainable. 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. (complaint no. 7 of 2018)* leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage. The said decision of the authority has been upheld by the Haryana Real Estate Appellate Tribunal in its judgement dated 03.11.2020,

in appeal nos. 52 & 64 of 2018 titled as ***Emaar MGF Land Ltd. V. Simmi Sikka and anr.***

F. Findings on the relief sought by the complainants

Relief sought by the complainants: The respondents be directed to being jointly and severally liable to pay the complainants as they are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 10.01.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 offer of possession..

13. In the present complaint, the complainants intend to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under.

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an flat, plot, or building, —

.....

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."

14. Clause 5.1 of flat buyer agreement (in short, agreement) provides for handing over of possession and is reproduced below:

“5.1 POSSESSION

(a) Time of handing over the possession

Subject Clause 5.1.:

“Subject to clause 5.2, and further subject to all the buyers/allottees of the Flats in the said Residential Project, making timely payment, the Company shall endeavour to complete the development of said Residential Project and the said Flat as far as possible within 48 (Forty Eight) months, with an extended period of 6 (six) months, from the date of execution of this Agreement or from the date of commencement of construction of the particular Tower/Block in which the said unit is situated subject to sanction of the building plan whichever is later.”

The authority has gone through the possession clause of the agreement and observe that the possession has been subjected to all kinds of terms and conditions of this agreement and the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoters. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoters and against the allottees that even a single situation may make the possession clause irrelevant for the purpose of allottees and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of handing over possession is only a tentative period for completion of the construction of the flat in question and the promoters are aiming to extend this time



period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals have been mentioned for commencement of construction and the said approvals are sole liability of the promoters for which allottee cannot be allowed to suffer. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the buyer's agreement by the promoters is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of his right accruing after delay in possession. This is just to comment as to how the builders have misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

- 15. Admissibility of grace period:** The flat buyer's agreement was executed on 10.07.2013 and as per clause 5.1 of the said agreement, the promoters have proposed to hand over the possession of the said unit within 48 (Forty Eight) months, with an extended period of 6 (six) months, from the date of execution of this agreement or from the date of commencement of construction subject to sanction of the building plan whichever is later. The due date of handing over possession has been calculated from the date of construction.

In the present case, the promoters are seeking 6 months' time as grace period. The said period of 6 months is allowed to the promoters for the exigencies beyond the control of the promoter. Therefore, the due date of possession comes out to be 14.02.2019.

16. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the rate of 10.75% p.a. however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoters, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

Rule 5.1 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 (MCLR) 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.

17. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the



prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases. The Haryana Real Estate Appellate Tribunal in **Emaar MGF Land Ltd. vs. Simmi Sikka (Supra)** observed as under: -

"64. Taking the case from another angle, the allottee was only entitled to the delayed possession charges/interest only at the rate of Rs.15/- per sq. ft. per month as per clause 18 of the Buyer's Agreement for the period of such delay; whereas, the promoter was entitled to interest @ 24% per annum compounded at the time of every succeeding instalment for the delayed payments. The functions of the Authority/Tribunal are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominate position and to exploit the needs of the homer buyers. This Tribunal is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the Buyer's Agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the Buyer's Agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the Buyer's Agreement dated 09.05.2014 are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the Buyer's Agreement will not be final and binding."

18. Consequently, as per website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as on date i.e., 23.02.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.



19. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(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 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;"*

20. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same as is being granted to the complainants in case of delayed possession charges.

21. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondents are in contravention of the section 11(4)(a) of the Act by not handing over possession by the due



date as per the agreement. By virtue of clause 15(a) of the agreement executed between the parties on 10.07.2013, the date of commencement of construction is 14.08.2014. The possession of the subject unit was to be delivered within 48 months from the date of execution of agreement or commencement of construction whichever is later. The date of construction being later than date of agreement. Therefore, the due date is calculated from date of construction which comes out to be 14.08.2018. As far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 14.02.2019. The respondents have failed to handover possession of the subject flat till date of this order. Accordingly, it is the failure of the respondents/promoters to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondents is established. As such the allottees shall be paid, by the promoters, interest for every month of delay from due date of possession i.e., 14.02.2019 till the handing over of the possession, at prescribed rate i.e., 9.30

% p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

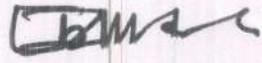
Directions of the authority

22. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondents are directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 14.02.2019 till the date of handing over possession within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoters to the allottees before 10th of the subsequent month as per Rule 16(2) of the rules.
- ii. The respondents shall not charge anything from the complainants which is not the part of the buyer's agreement.
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period within a period of one month after adjustment of arrears of interest in his account.

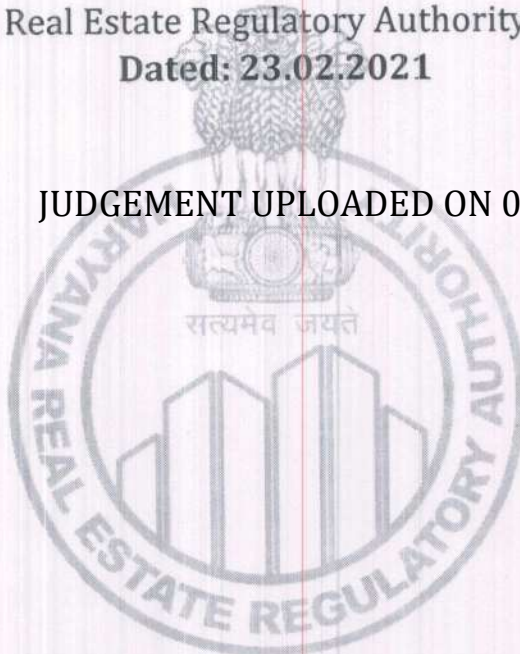
23. Complaint stands disposed of.
24. File be consigned to registry.


(Samir Kumar)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 23.02.2021

JUDGEMENT UPLOADED ON 07.09.2021



HARERA
GURUGRAM