BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. : 6135 of 2019
First date of hearing: 07.02.2020
Date of decision : 19.08.2021

Geeta Malik
R/o: - H.no IV/1-69, Gopi Nath Bazar, Cantt. New Delhi-110001 **Complainant**

Versus

Ansal Housing and Constructions limited
Regd. office: 15, UGF, Indra Prakash,
21, Barakhamba Road, New Delhi-110001 **Respondent**

CORAM:
Shri Samir Kumar **Member**
Shri Vijay Kumar Goyal **Member**

APPEARANCE:
Shri. Sanjeev Sharma Advocate for the complainants
Ms. Meena Hooda Advocate for the respondent

ORDER

1. The present complaint dated 03.12.2019 has been filed by the complainant/allottee in Form CRA 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 allottee as per the agreement for sale 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 complainant, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S. No.	Heads	Information
1.	Name and location of the project	Estella, Sector 103, Gurugram
2.	Nature of the project	Residential apartment
3.	Project area	15.743 acres
4.	DTCP License	17 of 2011 dated 08.03.2011 valid up to 07.03.2015
5.	Name of the licensee	Rattan Singh, Biro Devi and 7 others
6.	RERA registered/ not registered	**Not registered**
7.	Date of execution of plot buyer's agreement	**24.01.2013**
8.	Building plan approval	28.11.2011
9.	Unit no.	O-0903
10.	Super Area	1725 sq. ft
11.	Payment plan	Construction linked payment plan
12.	Total consideration	Rs. 71,38,750/- (as per payment plan at page 35 of the complaint)
13.	Total amount paid by the complainant	Rs. 72,25,496/- (as per customer ledger dated 12.9.2019 annexed at page 36 of the complaint)
14.	Due date of delivery of possession (*As per clause 30 of the agreement: The Developer shall offer of possession of the unit any time,*	24.01.2016 since date of agreement is later than date of building plan therefore due date is calculated from date of agreement

	within a period of 36 months from the date of execution of agreement or within 36 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all the dues by buyer and subject to force majeure circumstances as described in clause 31.Further there shall be a grace period of 6 months allowed to the developer over and above the period of 36 months as above in offering the possession of the unit.)	**(Grace period is not allowed)**
15.	Offer of possession	Not offered
16.	Occupation Certificate	Not received
17.	Delay in delivery of possession till the date of decision i.e 19.08.2021	5 years 6 months 26 days

B. Facts of the complaint

3. That it is humbly submitted that the complainant purchased a unit / apartment no. O-0903, admeasuring 1725 Sq. Ft. in the Project i.e. "ESTELLA located at Sector 103, Gurgaon, Haryana" floated by the respondent in the year 2011 on the inducement that the possession of the unit purchased shall be handed over on time with all amenities as promised.

4. That the flat buyer agreement with respect to the above said unit was executed on 21.01.2013. That as per the flat buyer agreement dated 21.01.2013 the total sale consideration of the unit was agreed to be Rs. 78,21,341/- (excluding GST, other charges etc.)

5. Further as per the clause "30 "of the flat buyer agreement, the possession of the unit was to be given by January 2016 with grace period of 6 months. Therefore, the possession of the unit was to be given latest by July 2016.

6. That further it is pertinent to mention here that the respondent being in the dominant position, the complainant was never in a position to negotiate the terms and conditions of the agreement.

7. That further the complainant till date has paid a total sum of Rs. 78,96,557.17/- to the respondent on the basis of the demand raise by the respondent though the construction of the project from day one was being carried on with delay.

That as per clause "30" it was stipulated that the possession was supposed to be delivered in July 2016, however even after a delay of 3 years and 4 months, the respondent till date has failed to handover the possession of the unit to the complainant.

8. That further the respondent have taken an amount exceeding the amount of the unit in question which is completely illegal thus the respondent be directed to stop doing such unlawful acts which are against the duties and obligations of the promoter under chapter III of the real estate regulatory act.

C. Relief sought by the complainant:

9. The complainant has sought following relief:

(a) To direct the respondent to pay interest for every month of delayed possession charges at prescribed rate of interest.

10. 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.

D. Reply by the respondent:

11. The complainant through an application form applied to the respondent for provisional allotment of a unit in its project detailed above. The complainant, in pursuance of the aforesaid application form, was allotted an independent unit bearing no. O-0903, type of unit – 3BHK + 1 toom + utility, sales area 1725 Sq. ft., (160.26 Sq. mtrs.) in the project, namely, Estella, situated at sector-103, Gurugram.

12. That without prejudice to the aforesaid and the rights of the respondent, it is submitted that it would have handed over the possession to the complainant within time had there been no force majeure circumstances beyond the control of the respondent. There had been several circumstances which were absolutely beyond the control of the respondent such as orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble Punjab & Haryana high court passed in Civil writ petition no.20032 of 2008 through which the shucking/extraction of water was banned being is the backbone of construction process; simultaneously, orders of different dates passed by the Hon'ble National Green Tribunal restraining thereby the excavation work causing air quality index being worse, maybe harmful to the public at large without

admitting any liability. Apart from these the demonetization is also one of the main factor to delay in giving possession to the home buyers as demonetization caused abrupt stoppage of work in many projects. The payments especially to workers were being made only by liquid cash. The sudden restriction on withdrawals led the respondent's inability to cop with the labour pressure. However, the respondent is carrying its business in letter and spirit of the flat buyer's agreement as well as in compliance of other local bodies of Haryana government as well as the centre government.

13. The provisions of the act cannot undo or modify the terms of an agreement duly executed prior to coming into effect of the act. The interest for the alleged delay demanded by the complainant is beyond the scope of the buyer's agreement. The complainant cannot demand any interest or compensation beyond the terms and conditions incorporated in the buyer's agreement.

14. It is submitted that in view of clause-30, the respondent was required to handover the possession within a period of 42 months from the date of execution of agreement or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later, subject to timely payment of all the dues by buyer and subject to force majeure circumstances. Further, it is also clearly mentioned in clause-30 of the agreement that there shall be a grace period of 6 months allowed to the developer over and above the period of 42 months as above in offering the possession of unit. It is submitted

that the respondent had applied for registration with the authority of the said project by giving a fresh date for offering of possession.

15. It is submitted that all the queries of the complainant were always attended by the respondent and its team. The respondent and its team were always there to redress the grievance of the complainant, and always attended the communication not limited up-to personal visit or telephone of the complainant.

16. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents.

17. The authority on the basis of information and explanation and other submissions made and the documents filed by the complainant and the respondent is of considered view that there is no need of further hearing in the complaint.

E. Jurisdiction of the authority

18. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per the provisions of section 11(4) (a) of the act of 2016 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:

F1. Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

19. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

20. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and

agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of ***Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)*** which provides as under:

> *"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter...*
>
> *122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."*

21. Also, in appeal no. 173 of 2019 titled as ***Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya***, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

> *"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."*

22. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F2. Objection regarding delay due to force majeure

23. The respondent promoter has sought further extension for a period of 6 months after the expiry of 36 months for unforeseen delays in respect of the said project. The respondent raised the contention

that the construction of the project was delayed due to *force majeure* conditions including demonetization and the orders passed by the Hon'ble NGT including others. It is observed that due date of possession as per the agreement was 24.01.2016 wherein the event of demonetization occurred in November 2016. By this time, the construction of the respondent's project must have been completed as per timeline mentioned in the agreement executed between the parties. Therefore, it is apparent that demonetization could not have hampered the construction activities of the respondent's project. Thus, the contention raised by the respondent in this regard stand rejected. The other force majeure conditions mentioned by the respondent are of usual nature and the same could not have led to a delay of more than 5 years. Therefore, the respondent could not be allowed to take advantage of its own wrongs/faults/deficiencies.

F3. Objection regarding delayed payments

24. Though an objection has been taken in the written reply that the complainant failed to make regular payments as and when demanded. So, it led to delay in completing the project. The respondent had to arrange funds from outside for continuing the project. However, the plea advanced in this regard is devoid of merit. A perusal of statement of accounts shows otherwise wherein like other allottees, the complainant had payed more than 90% of the sale consideration. The payments made by the allottee does not match the stage and extent of construction of the project. So, this

plea has been taken just to make out a ground for delay in completing the project and the same being one of the force majeure.

G. Findings on the Relief Sought filed by the complainant:

Relief sought by the complainant: The respondent immediately be directed to grant the possession of unit along with compensation for the delay caused herein to the complaint.

25. In the present complaint, the complainant intends 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***
>
> *If the promoter fails to complete or is unable to give possession of an apartment, 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*

26. As per clause 30 of the apartment buyer's agreement dated 24.01.2013, the possession of the subject unit was to be handed over by of 24.01.2016. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the

promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. Clause 30 of the apartment buyer agreement (in short, agreement) provides for handover possession and is reproduced below:

> ***Clause 30:***
> *"The Developer shall offer of possession of the unit any time, within a period of 36 months from the date of execution of agreement or within 36 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later subject to timely payment of all the dues by buyer and subject to force majeure circumstances as described in clause 31.Further there shall be a grace period of 6 months allowed to the developer over and above the period of 36 months as above in offering the possession of the unit."*

27. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottee are protected candidly. The apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted apartment buyer's agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary

educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

28. The authority has gone through the possession clause of the agreement. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this agreements and in compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the apartment buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit

and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has 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.

29. The respondent promoter has proposed to handover the possession of the subject apartment within a period of 36 months from the execution of the agreement or the date of approval of building plans and/or fulfilment of the preconditions imposed thereunder plus 6 months grace period for unforeseen delays beyond the reasonable control of the company i.e., the respondent/promoter.

30. Further, the authority in the present case observes that, the respondent has not kept the reasonable balance between his own rights and the rights of the complainant/allottee. The respondent has acted in a pre-determined and preordained manner. The respondent has acted in a highly discriminatory and arbitrary manner. The unit in question was booked by the complainant and the apartment buyer's agreement was executed between the respondent and the complainant on 24.01.2013. The date of approval of building plan is 28.11.2011. It will lead to a logical conclusion that that the respondent would have certainly started the construction of the project. On a bare reading of the clause 30 of the agreement reproduced above, it becomes clear that the possession in the present case is linked to the "fulfilment of the preconditions" which are so vague and ambiguous in itself.

Nowhere in the agreement it has been defined that fulfilment of which conditions forms a part of the pre-conditions, to which the due date of possession is subjected to in the said possession clause. Moreover, the said clause is an inclusive clause wherein the "fulfilment of the preconditions" has been mentioned for the timely delivery of the subject apartment. It seems to be just a way to evade the liability towards the timely delivery of the subject apartment. According to the established principles of law and the principles of natural justice when a certain glaring illegality or irregularity comes to the notice of the adjudicator, the adjudicator can take cognizance of the same and adjudicate upon it. The inclusion of such vague and ambiguous types of clauses in the agreement which are totally arbitrary, one sided and totally against the interests of the allottees must be ignored and discarded in their totality. In the light of the above-mentioned reasons, the authority is of the view that the date of execution of agreement ought to be taken as the date for determining the due date of possession of the unit in question to the complainant.

31. **Admissibility of grace period:** The respondent promoter has proposed to hand over the possession of the apartment within 36 months from the date of execution of the agreement or fulfilment of the preconditions imposed thereunder. The respondent promoter has sought further extension for a period of 6 months after the expiry of 36 months for unforeseen delays in respect of the said project. Further, the respondent has sought 6 months grace period for offering possession of the unit and the respondent has failed to

offer of possession even after the lapse of grace period of 6 months and till date. The respondent raised the contention that the construction of the project was delayed due to force majeure which were beyond the control of the respondent promoter. Also, the allottees should not be allowed to suffer due to the fault of the respondent promoter. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoters themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allotee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoter has not assigned such compelling reasons as to why and how it is entitled for further extension of time 6 months in delivering the possession of the unit. Accordingly, this grace period of 6 months cannot be allowed to the promoters at this stage.

32. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant is seeking delay possession charges however, proviso to section 18 provides 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 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 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 (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.*

33. 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.

34. 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., 19.08.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

35. 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;"*

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

36. On consideration of the circumstances, the evidence and other record and submissions made by the complainant and the respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 30 of the buyer's agreement executed between the parties on 24.01.2013, possession of the booked unit was to be delivered within a period of 36 months from the date of execution of the agreement, which comes out to be 24.01.2016

Accordingly, the non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent is established. As such the complainant is entitled for delayed possession charges @9.30% p.a. w.e.f. from due date of possession i.e. 24.01.2016 till handing over of possession after the date of receipt of valid occupation certificate as per section 18(1) of the Act read with the rule 15 of the rules and section 19(10) of the Act of 2016.

H. Directions of the authority

37. Hence, the authority hereby passes this order and issue the 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. The respondent shall pay interest at the prescribed rate i.e. 9.30% per annum for every month of delay on the amount paid by the complainant from due date of possession i.e. 24.01.2016 till handing over of possession after the date of receipt of valid occupation certificate as per section 18(1) of the Act read with the rule 15 of the rules and section 19(10) of the Act of 2016.

ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest to be paid till offer of possession shall be paid on or before the 10th of each succeeding month.

iii. The complainant is also directed to make payment /arrear if any due to the respondent at the equitable rate of interest i.e 9.30% per annum.

iv. The respondent shall not charge anything from the complainant which is not the part of buyer's agreement. The respondent is not entitled to charge holding charges from the complainant/allottee at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble supreme court in civil appeal nos. 3864-3889/2020 on 14.12.2020.

38. Complaint stands disposed of.

39. File be consigned to registry.

(Samir Kumar)
Member

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated:19.08.2021