

**BEFORE RAJENDER KUMAR, ADJUDICATING OFFICER,
HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM**

Complaint no. : 4652 of 2020

Date of decision : 11.10.2021

NIRAJ GOYAL AND
DEEPSHIKHA GOYAL
R/O : H.No. 363/4,
418 Merla, Model Town
Gurugram-122002

Complainants

Versus

ASHIANA DWELLINGS PVT. LTD.
ADDRESS: 5F, Everest 46/C,
Chowrinhgee Road, Kolkata,
W.B.- 700071

Respondent

APPEARANCE:

For Complainants:

Mr. Sukhbir Yadav (Advocate)

For Respondent:

Mr. S. M. Ansari (Advocate)

ORDER

1. This is a complaint filed by Niraj Goyal and Deepshikha Goyal (also called as buyers) under section 31 of The Real

Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 29 of The Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) against respondent/developer.

2. As per complainants, they booked a flat in respondent's project "**Ashiana Mullberry**", situated at sector-2, Sohna Road, Gurugram on 09.02.2016, and made payment of Rs 6,00,000 as booking amount. The respondent issued a provisional allotment letter dated 24.02.2016 and allotted unit No. B-307 in Tower T 2 admeasuring 1465 sq. ft. for a total consideration of Rs 87,36,914 , including BSP, EDC, IDC with taxes etc. A builder buyer agreement (BBA) was executed on 24.02.2016.
3. As per the Clause 11.2 of buyer's agreement, the possession of the unit was proposed to be delivered within 39 months from the date of execution of buyer's agreement or start of construction after the grant of Environmental Clearance by MOEF whichever is later with 6 months grace period. The respondent failed to complete the construction work and consequently failed to deliver the possession of the unit till date.
4. The complainants have paid all dues as demanded by the respondent from time to time. The complainants enquired about the progress of the construction, but the respondent

failed to provide any clear date of completion of the project to the complainants. The complainants visited the project site on 06.11.2020 and found that the construction work of the tower in which their unit is situated is far from completion. The respondent has failed to obtain the occupation certificate. The complainants have paid Rs 81,37,840 i.e. 92% of entire agreed consideration along with miscellaneous and additional charges etc on time.

5. The complainants vide email dated 06.04.2020 enquired about the status of construction work and occupation certificate. Due to delay in handing over of possession, complainants vide email dated 01.11.2020 sought refund of their money with interest.
6. As per the details available on website of MCA/ROC, there were two directors of the company Rohit Raj Modi and Mayank Raj Modi, and after resignation of both the directors, there is no active director in the company, which is violation of the statutory requirement.
7. As respondent has committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of the unit in question, the complainants have prayed for refund of entire amount of Rs 81,37,840 along with interest at prescribed rate.

Kmd
A.O.,

11/10/21

8. The particulars of the project are reproduced here as under in tabular form:

S.No.	Heads	Information
PROJECT DETAILS		
1.	Project name and location	" Ashiana Mullbery ", Sector 2, Sohna, Gurugram, Haryana
2.	Project area	10.25 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	16 of 2014 dated 10.06.2014 valid upto 09.06.2019
5.	RERA Registered/ not registered	Registered vide no. 44 of 2017 dated 11.08.2017
UNIT DETAILS		
1.	Unit No.	B-307
2.	Unit measuring	1465 sq. ft.
3.	Date of Booking	09.02.2016
4.	Date of Allotment Letter	24.02.2016
5.	Date of Buyer's Agreement	24.02.2016
6.	Due Date of Delivery of Possession Clause 11.2 of buyer's agreement:	24.05.2019

	the possession of the unit was proposed to be delivered within 39 months from the date of execution of buyer's agreement or start of construction after the grant of Environmental Clearance by MOEF whichever is later with 6 months grace period.	
7.	Delay in handing over of possession till date	2 year 05 months
PAYMENT DETAILS		
8.	Total sale consideration	Rs 87,36,914
9.	Amount paid by the complainants	Rs 81,37,840
10	Payment Plan	Construction linked payment plan

9. The respondent contested the complaint by filing a reply dated 15.02.2021. It is averred that complainants failed to make payment as per the payment plan opted by them and have made several defaults in the payment of instalments towards the subject unit. the possession of unit was to be delivered within 39 months with grace period of 6 months subject to timely payment by the allottee as well as force

majeure circumstances. The construction work was stopped several times during the year 2016, 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and Supreme Court. Due to increase in level of pollution, hon'ble Supreme Court vide its order dated 14.11.2019 in the matter of **M.C. Mehta v Union of India & others, writ petition (c) No. 13029/1985**, had imposed complete ban on construction and excavation work which was uplifted completely on 14.02.2020.

10. The construction work is going on its full swing and major part of it, is already completed, despite the financial obstacles due to economic slowdown. Due to current pandemic covid-19 situation the construction at the site is slowed down. Moreover, on 30.09.2020 a team appointed by hon'ble authority duly inspected the project site and was satisfied with the construction activities. The money paid by allottees have been utilised for the construction of the project and it is not feasible to pay back the amount as sought by the complainants.

11. It is further contended that there is an arbitration clause (clause 28.2) in the agreement, complainants without invoking arbitration proceedings, have filed this complaint and the same is liable to be dismissed.


A.O.,

11-10-21

12. It (respondent) had always kept complainants aware of the status of the project, and to avoid contractual obligation complainants have filed frivolous which is liable to be dismissed.
13. I have heard the counsels for the parties and have perused the record
14. It is an admitted position that occupation certificate for the said tower has not been obtained by the respondent. In compliance of the order dated 30.07.2021, respondent has filed an affidavit of Mr. Ramphal Yadav, authorised representative of respondent company wherein it has been mentioned that due several court orders and other force majeure conditions the construction work was halted for 37 weeks. As per the table of status of construction and photographs filed by the respondent, the project is almost 85 % complete.
15. As per terms of buyer's agreement, possession of the unit was to be given within 39 months from the date of execution of agreement or start of construction after grant of environmental clearance by MOEF, whichever is later, with 6 months grace period. There is no evidence on record to show date of start of construction, thus due ^{date} for possession ~~date~~ is calculated from date of agreement i.e. 24.02.2016. it comes out as 24.05.2019. Even if contention of the respondent that construction was halted for 37 weeks due to various court orders is accepted, still the construction work ought to have been completed by February 2020.

When even as per respondent construction remained stopped for 37 weeks due to various orders (of courts) the respondent is entitled to grace period of 37 weeks only and not ~~of~~ ⁸ 6 months, as mentioned in BBA. As per the status report filed by the respondent, project is 85 % complete, ~~but~~ ² ~~No~~ fixed date has been given by the respondent till when it will deliver the possession of the unit to the complainants.

16. As per clause 11.6 of the buyer's agreement, in case of delay of more than 12 months in completion of construction of unit as per scheduled given in the agreement, the allottee shall be entitled to withdraw from the project and claim refund of the amount paid by him with 9 % interest.
17. So far as contention of respondent with respect to arbitration clause is concerned, none of parties appeared serious about this provision. Even respondent did not invoke any proceedings under Arbitration Act. Moreover, Act of 2016, being a special legislation for protection of interest of consumers in real estate sector, has overriding effect over other laws in existence, even over agreement between the parties.
18. When buyers have made timely payment towards the allotted unit, same are well within their right to claim possession as per agreement. A buyer cannot be made to wait indefinitely, for his/her dream unit. It is not claimed on behalf of respondent that it has received the occupation certification for the tower in which the allotted unit is situated.

hvl
A.O.
11/10/21

19. Considering facts stated above, complaint in hands is accordingly allowed and respondent is directed to refund Rs Rs 81,37,840 to complainants within 90 days from today, with interest @ 9.3 % p.a. from the date of each payment, till realisation of amount. A cost of litigation Rs 50,000 is also imposed upon respondent to be paid to complainants.

11.10.2021


(RAJENDER KUMAR)
Adjudicating Officer
Haryana Real Estate Regulatory Authority
Gurugram

Judgement uploaded on 14.10.2021.