

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

**Complaint no. : 4635 of 2020**

**Date of decision : 11.10.2021**

AMIT GOEL AND  
SHIKHA JAIN  
R/O : Flat No- 402,  
CS-04, Supertech  
Capetown, Sector-74,  
Noida-201301

**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)

  
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**ORDER**

1. This is a complaint filed by Amit Goel and Shikha Jain (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 Mullbery**", situated at sector-2, Sohna Road, Gurugram on 30.06.2015, and made payment of Rs 9,00,000. The respondent issued a provisional allotment letter dated 27.10.2015 and allotted unit No. A-1101 in Tower T 1 admeasuring 1730 sq. ft. for a total consideration of Rs 93,13,970 , including BSP, EDC, IDC with taxes etc. A builder buyer agreement (BBA) was executed on 17.11.2015.
3. As per Clause 11.2 of buyer's agreement, possession of 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 complainant enquired about the progress of the construction, but the respondent failed to provide any clear date of completion of the project to the complainants. They (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 78,96,453.26 i.e. 84 % of entire agreed sale consideration along with miscellaneous and additional charges etc on time.
5. 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.
6. 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 78,96,453.26 along with interest at prescribed rate.

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

S.No.	Heads	Information
<b>PROJECT DETAILS</b>		
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
<b>UNIT DETAILS</b>		
1.	Unit No.	A-1101
2.	Unit measuring	1730 sq. ft.
3.	Date of Booking	30.06.2015
4.	Date of Allotment Letter	27.10.2015
5.	Date of Buyer's Agreement	17.11.2015
6.	Due Date of Delivery of Possession Clause 11.2 of buyer's agreement:	January 2020 (Construction work commenced in April 2016)



	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	1 year 09 months
<b>PAYMENT DETAILS</b>		
8.	Total sale consideration	Rs 93,13,970
9.	Amount paid by the complainant	Rs 78,96,453.26
10	Payment Plan	Performance linked payment plan

8. The respondent contested the complaint by filing a reply dated 15.02.2021. It is averred on 30.03.2016, permission to mortgage was issued by respondent to SBI Bank and a tripartite agreement dated 28.03.2016 was executed among complainants, respondent and State Bank of India.
9. It is further contended that complainants failed to make payment as per the payment plan opted by them and have

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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.

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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.
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, i.e. an authorised representative of respondent company wherein it has been mentioned that due to 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. According to complainants, as per clause 11.2 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. The plea of complainant that construction work started in April

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2016, is not denied by respondent . Even if contention of the respondent that construction was halted for 37 weeks, due to various orders is accepted, the respondent ought to have offered possession till May 2020. As per the status report filed by the respondent, the project is 85 % complete till now. The respondent is not in position to tell as till when it can deliver 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 schedule 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. <sup>As</sup> far as contention of respondent with respect to arbitration clause is concerned, even respondent has not contended that it had invoked 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 and also over covenants between parties.
18. When buyers have made timely payment towards the allotted unit, same <sup>were</sup> ~~was~~ well 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

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19. Considering facts stated above, complaint in hands is accordingly allowed and respondent is directed to refund Rs Rs 78,96,453.26 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 16.10.2021.