

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

Complaint no. : 2397 of 2021
Date of first hearing: 01.07.2021
Date of decision : 01.07.2021

Vimla Singh
R/o: Flat no.- 2301, Lords Apartments
CGHS, Plot no. 7, Sector-19B, Dwarka,
New Delhi-110075

Complainant

Versus

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

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

Respondents

CORAM:

Shri K.K. Khandelwal
Shri Samir Kumar
Shri Vijay Kumar Goyal

Chairman
Member
Member

APPEARANCE:

Ms. Priyanka Agarwal
None

Advocate for the complainant
Advocate for the respondent(s)

EX-PARTE ORDER

1. The present complaint dated 11.06.2021 has been filed by the complainant/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 complainant, 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 Phase-II", Sector 91, Gurugram
2.	Project area	14.412 acres
3.	Nature of the project	Group Housing
4.	DTCP license no.	48 of 2010 dated 21.06.2010
	DTCP license validity status	20.06.2016
	Name of licensee	M/s Aravali Heights Infrastructure Pvt. Ltd Vikram Singhm M/s SRP Builders
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	20.06.2011

		[Page 27 of complaint]
7.	Unit no.	0704-H-0403 [Page 33 of complaint]
8.	Unit area	1618 sq. ft. [page 33 of complaint]
9.	Payment plan	Construction linked plan [page 56 of complaint]
10.	Date of execution of flat buyer agreement	26.07.2013 [page 31 of complaint]
11.	Total consideration as per customer ledger account dated: 17.03.2021	Rs. 52,56,250/- [page 64 of complaint]
12.	Total amount paid by the Complainant as per customer ledger account dated: 17.03.2021	Rs. 36,05,747.08/- [page 65 of complaint]
13.	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)	26.07.2017 (Note: As the no date of commencement of construction is provided. So, it is calculated from date of agreement i.e. 26.07.2013) (Grace period is not allowed)
14.	Delay in handing over possession till date of decision i.e. 01.07.2021	3 years 11 months 5 days

B. Facts of the complaint.

3. That the complainant approached the respondent for booking of an apartment admeasuring 1618 Sq. ft. in "THE FERNHILL", Sector-91, Gurugram and paid booking amount Rs 4,00,000/- through cheques no. 212012 dated 12.05.2011. The

respondents on through allotment letter dated 20.06.2011 was allotted apartment no. H-403, Tower-H, admeasuring 1618 Sq. ft. in the project.

4. That the respondent to dupe the complainant in their nefarious net even executed a one-sided flat buyer agreement between the parties on dated 26.07.2013. Just to create a false belief that the project shall be completed in time bound manner, and in the garb of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainant.
5. That the total cost of the said flat is Rs 52,56,250/- excluding taxes and sum of Rs. 36,05,747/- has been paid by the complainant till date (which is more than 65% of total sale consideration) in the time bound manner. Moreover, only last instalment remains as per the payment schedule. The respondent demanded the amount without doing appropriate work on the said project which is illegal and arbitrary.
6. That as per clause 5.1 of said agreement, the respondents were liable to hand over the possession of a said unit before 26.07.2017 which stands so far from completion. As per construction status and absence of basic amenities respondents would take more time to give physical possession after getting occupancy certificate.

7. That the builder in last 10 years has made many false promises for possession of flat and current status of the project, which is still desolated, raw and not even 70 % completed.
8. That as per section 19 (6) the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act) complainant has fulfilled his responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, the complainant herein was not in breach of any of its terms of the agreement whereas the builder breached the trust and agreement.
9. That the respondent to extract monies from allottees devised a payment plan under which respondent linked 35 % amount of total sale consideration to the time lines, which is not depended or co-related to the finishing of flat and internal development of facilities amenities. After getting the same respondents had not bothered for development. The complainant also wrote the letter to respondent regarding possession of the flat and other issue. But respondent did not reply to the query of complainant.
10. That the respondents executed a one-sided FBA and used new trick for extracted extra money from complainant and imposed many unilateral charges and charged interest on delayed instalment at the rate of 24 % p.a. compounded

quarterly as per clause 4.5 of FBA and on contrary, as per clause no 5.5, delay penalty charges in case of default by the respondents would be Rs 10 per Sq. ft per month is totally illegal, arbitrary and unilateral.

11. That the respondent has indulged in all kinds of tricks and blatant illegality in booking and drafting of FBA with a malicious and fraudulent intention and caused deliberately and intentionally huge mental and physical harassment to the complainant and his family. The respondents have rudely and cruelly dashed the savoured dreams, hopes and expectations of the complainant to the ground and the complainant is eminently justified in seeking possession of flat along with delayed possession charges.
12. That keeping in view the snail paced work at the construction site and half-hearted promises of the respondents, and tricks of respondent to extract more and more money from complainant pocket is evident from the irresponsible and desultory attitude and conduct of the respondents, consequently injuring the interest of the buyers including the complainant who has spent his entire hard earned savings in order to buy this home and stands at a crossroads to nowhere.
13. That due to the malafide intentions of the respondent and non-delivery of the flat unit the complainant has accrued huge

losses on account of the career plans of their family member and themselves and the future of the complainant and their family are rendered dark as the planning with which the complainant invested her hard earned monies have resulted in sub-zero results and borne thorns instead of bearing fare ruts. The inconsistent and lethargic manner, in which the respondent conducted its business and their lack of commitment in completing the project on time, has caused the complainant great financial and emotional loss.

14. That the cause of action to file the instant complaint lies within the jurisdiction of this Hon'ble Authority as the apartment which is the subject matter of this complaint is situated in Sector 91, Gurugram which is within the jurisdiction of this Hon'ble Authority.

C. Relief sought by the complainant:

15. The complainant has sought following relief:
- (i) Direct the respondents to hand over the possession along with 24% interest per annum from the promissory date of delivery of the flat in question till actual delivery of the flat.
16. The authority issued a notice dated 14.06.2021 of the complaint to the respondents by speed post and also on the given email address at fernhillgrievancesgurgaon@ansalapi.com. The delivery

reports have been placed in the file. Despite service of notice, the respondents have preferred neither to put in appearance nor file reply to the complaint within the stipulated period. Accordingly, the authority is left with no other option but to decide the complaint ex-parte against the respondents.

17. 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 based on these undisputed documents and submission made by the complainant.

D. Jurisdiction of the authority

18. 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.*

E. Findings on the relief sought by the complainant

Relief sought by the complainant: Direct the respondents to immediately deliver the possession along with 24% per annum interest compounded quarterly for the delayed period of handing over the possession till the date of delivery of possession as mentioned in the FBA.

19. In the present complaint, the complainant intends to continue with the project and is seeking delayed 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 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."

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

5. POSSESSION OF UNIT: -

5.1. "Subject to clause no. 5.2 and further subject to all buyers/allottees of the flats in the said project, making timely payment, The company shall endeavour to complete the development said project and the said flat as far as possible within 48 months with an extended period of 6 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".

21. 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. 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 allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoters 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 flat buyer agreement by the promoters are 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.

22. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the apartment within a period of within 48 months with an extended period of 6 months from the date of execution of this agreement or from the date of commencement of construction of the particular tower in

which the said unit is situated subject to sanction of the building plan whichever is later. For what purpose such extension of 6 months is asked for is also not stated. As a matter of fact, the promoters have not offered the possession till date. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of 6 months cannot be allowed to the promoters at this stage. The same view has been upheld by the hon'ble Haryana Real Estate Appellate Tribunal in appeal nos. 52 & 64 of 2018 case titled as *Emaar MGF Land Ltd. VS Simmi Sikka* case and observed as under: -

68. As per the above provisions in the Buyer's Agreement, the possession of Retail Spaces was proposed to be handed over to the allottees within 30 months of the execution of the agreement. Clause 16(a)(ii) of the agreement further provides that there was a grace period of 120 days over and above the aforesaid period for applying and obtaining the necessary approvals in regard to the commercial projects. The Buyer's Agreement has been executed on 09.05.2014. The period of 30 months expired on 09.11.2016. But there is no material on record that during this period, the promoter had applied to any authority for obtaining the necessary approvals with respect to this project. The promoter had moved the application for issuance of occupancy certificate only on 22.05.2017 when the period of 30 months had already expired. So, the promoter cannot claim the benefit of grace period of 120 days. Consequently, the learned Authority has rightly determined the due date of possession.

23. Admissibility of delay possession charges at prescribed

rate of interest: The complainant is seeking delay possession

charges at the rate of 24% 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 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.

24. 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 home 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."

25. 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., 01.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
26. 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;”*

27. Therefore, interest on the delay payments from the complainant 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 complainant in case of delayed possession charges.
28. On consideration of the documents available on record and submissions made 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 5.1 of the agreement executed between the parties on 26.07.2013, the possession of the subject apartment was to be delivered within 48 months with an extended period of 6 months from the date of execution of this agreement or from the date of commencement of construction subject to sanctions of Building plans, whichever is later. There is nothing on the record to prove the date of commencement of

construction or sanctions of Building plans of the tower in which the allotted unit is situated. So, as per clause 5.1 of flat buyer's agreement dated 26.07.2013, the due date of handing over of possession of the tower of the allotted unit would be calculated from date of said agreement. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession is 26.07.2017. The respondents have failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondents/promoters to fulfil their 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 allottee shall be paid, by the promoters, interest for every month of delay from due date of possession i.e., 26.07.2017 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.

F. Directions of the authority

29. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions 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., 26.07.2017 till the date of handing over of possession.
- ii. The arrears of such interest accrued from 26.07.2017 till the date of order by the authority shall be paid by the promoters to the allottee 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 allottee before 10th of the subsequent month as per rule 16(2) of the rules.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoters, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoters shall be liable to pay the

allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

- v. The respondents shall not charge anything from the complainant which is not the part of the agreement. However, holding charges shall also not be charged by the promoters at any point of time even after being part of agreement as per law settled by Hon'ble Supreme Court in civil appeal no. 3864-3889/2020.

29. Complaint stands disposed of.

30. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal)
Member


(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 01.07.2021

Judgement uploaded on 18.10.2021.