

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

Complaint no. : 1132 of 2021
Date of first hearing : 09.04.2021
Date of decision : 01.07.2021

Abhinav Narula
R/o: L-49D, 1st Floor,
Block L, Saket, New Delhi- 110017

Complainant

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:

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

**Chairman
Member
Member**

APPEARANCE:

Sh. Nilotpal Shyam
None

Advocate for the complainant
Advocate for the respondents

EX-PARTE ORDER

1. The present complaint dated 02.03.2021 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 Colony
4.	DTCP license no.	48 of 2010 dated 21.06.2010
	DTCP license validity status	20.06.2016
	Name of licensee	Aravali Heights Infratech Pvt. Ltd. Vikram Singh SRP Builders Pvt. Ltd.
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.	Unit no.	0704-F-0903 Tower- F [Page 27 of complaint]
7.	Unit area	1348 sq. ft.

		[page 27 of complaint]
8.	Payment plan	Construction linked plan [page 50 of complaint]
9.	Date of execution of flat buyer agreement	30.07.2013 [page 25 of complaint]
10.	Total consideration as per customer ledger account dated: 13.06.2017	Rs. 45,06,860/- [page 57 of complaint]
11.	Total amount paid by the complainant as per customer ledger account dated 13.06.2017	Rs. 38,93,955/- [page 66 of complaint]
12.	Commencement of construction	14.08.2014 (as per customer ledger dated 13.06.2017 at page 61 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)	14.08.2018 (Note: Calculated from the date of commencement of construction i.e. 14.08.2014) (Grace period is not allowed)
14.	Delay in handing over possession till date of decision i.e. 01.07,2021	2 years 10 months 17 days

B. Facts of the complaint.

- The complainant submitted that respondents through their representative had approached the complainant and represented that a residential project named "The FERNHILL" will effectively serve the residential purpose of complainant and his family and has best of the amenities and claimed that

they have acquired rights, title and interests from land owners (Aravali Heights Infratech Ltd. and SRP Builders Ltd.) wherein the said land owners have obtained License from the Director General, Town & Country Planning, Haryana ("DGTCP") for development of the project land into group housing complex comprising of multi-storied residential apartments in accordance with law. The respondent no. 1 (hereinafter referred to as "respondent company") claimed that they have obtained marketable, construction and development rights with regard to the impugned project from respondent No. 2 wherein the respondent No. 1 was further assigned to realize the sale price from the allottees including complainant in accordance with terms of agreements entered between respondents. Accordingly, all the payments were made by the complainant through respondent company only.

4. That based on representation and enquiries made, the complainant bought the property in resale and submitted application on 24/12/2012. The complainant also made a payment of Rs 400000/- for allotment of Unit No. 0704-F-0903 of "THE FERNHILL" project. Accordingly, allotment letter dated 24.07.2013 was issued for the impugned unit by the respondent company in favour of complainant.

5. That the parties entered into an agreement i.e. flat buyer's agreement (hereinafter referred as "FBA") dated 30.07.2013 for the sale of said unit No.0704-F-0903. As per terms of FBA, the respondent company agreed to sell/convey/transfer the flat unit number 0704-F- 0903, with the exclusive right to use parking space for an amount of Rs. 45,06,860/-. The complainant had already paid a sum of Rs 38,93,955/- on account of part sale consideration, taxes, etc. in respect of the impugned project.
6. That the possession of flat was proposed to be handed over in accordance with clause 5 of FBA wherein as per clause 5.1 of the FBA, the possession date for the impugned unit was agreed to be within 48 months with an extended period of 6 months from the date of commencement of construction.
7. That the respondent company executed the agreement for sale wherein the complainant agreed to the terms and conditions of the standard form of contract i.e. FBA as set forth under this agreement wherein form FBA made on dotted lines. Clause 5 of FBA is arbitrary and illegal and amounts to unfair trade practice and is not binding on the complainant in view of the Judgment of Hon'ble Supreme Court in Pioneer Urban Land & Infrastructure Ltd. V. Geetu Gidwani Verma and Anr. CA No.

1677 of 2019 judgment dated 4/02/2019 wherein the Hon'ble Supreme Court observed as under:

"A term of a contract will not be final and binding if it is shown that the flat purchasers had no option but to sign on the dotted line, on a contract framed by the builder. The contractual terms of the Agreement dated 08.05.2012 are ex-facie one-sided, unfair, and unreasonable. The incorporation of such one-sided clauses in an agreement constitutes an unfair trade practice as per Section 2(r) of the Consumer Protection Act, 1986 since it adopts unfair methods or practices for the purpose of selling the flats by the Builder. "

It is a matter of record that the FBA signed between the parties was a standard form of agreement which was signed by every other allottees wherein there was no option to the complainant but to sign on the dotted lines on a contract which was framed by the builder with no room for any negotiation power whatsoever vested with complainant.

8. The said clause 5.1 of FBA provides unreasonable conditions such as due possession date from the commencement of construction of particular tower and which started only in August 2014 in so far as impugned tower relates wherein the complainant made the first payment on 13.05.2011. The FBA was executed on 30th July 2013, therefore, further the delaying the time period of handing over possession i.e. 4 years + 6 months (grace period) from 30 July 2013 is arbitrary and amounts to unfair trade practice. Further, the said clause 5.1 further stipulates that the possession is subject to all the

buyers/allottees in the impugned project, the said condition is ex facie arbitrary and unreasonable as the complainant has no control over the timely payments of other allottees who are neither privy to the instant FBA nor holds any interest impugned unit. Therefore, in view of the binding judgment of Hon'ble Supreme Court, the said clause 5.1 of FBA in so far as it subject the delivery of possession of impugned unit to such arbitrary condition and delay it to four years from the date of start of construction.

9. The Complainant further submitted that without prejudice, even assuming clause 5.1 of FBA to be valid, the respondent company failed to handover the possession within stipulated time i.e. by 30th December 2017 wherein extended period is included. Therefore, the complainant has statutory right to claim interest for delayed period in view of Section 18 of Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as "RERA Act, 2016"). It has been almost 8 years from the date of first payment made by the complainant to the respondent company with still no clear deadline as to the completion of construction and handing over the possession.
10. That the complainant money has been held in ransom for such a prolonged period for no fault of the complainant and it cannot be forced to continue in the impugned project endlessly

especially wherein there is no tangible deadline for handing over the possession is in sight.

11. That the clause 4.5 of said FBA also stipulates a penal interest @24% per annum compounded quarterly unconditionally for any delay in payment of instalments to the respondent company whereas in contrast, the respondents shall pay compensation @ Rs.10/- per sq.ft. of the super area per month for any delay in handing over the possession of impugned Unit that too subject to the force majeure conditions. Such a term is not only arbitrary but also amounts to unfair trade practice.
12. That the FBA further stipulates under Clause 5.5 that respondent company, if failed to deliver the possession of the impugned unit within 30 days from the date of intimation of possession by the respondent and subject to the force majeure conditions shall pay compensation @ Rs.10/ per sq.ft. of the super area per month for the entire period till the date of handing over the possession. The said compensation clause is also in direct conflict with the RERA Act, 2016 and rules made there -under. Therefore, the Clause 5.5 of FBA is *non est* in law as it is discriminatory *qua* clause 45 of FBA and in view of the fact that it is repugnant to the explicit statutory provision also amounts to unfair trade practice hence in violation of Section 23 of Indian Contract Act, 1872.. The Complainant craves leave

of Hon'ble Authority to produce and rely upon relevant judgments at the time of oral hearing as may be required.

13. That the last demand was made on 18th April 2017. No demand has been made after that. It's been around 4 months at the time of filing the instant complaint. Therefore, it is showing the negligent progress of the construction of the impugned project. Even if the respondent company completes the construction of impugned unit lots of amenities were promised at the time of booking like 65% landscaped green area, club with swimming pool, amphitheatre, jogging track, convenient stores, play school for kids, single gated entry, video phones and intercom, burglar alarms badminton court, basketball court, Mahesh Bhupati's Tennis academy, Mini Golf course, table tennis, skating ring, primary school, medical centre, hypermarket, ATM etc. These amenities were listed in project brochure and/or in the offer of allotment letter. These amenities don't seem to come to reality as of now on the project site. The Complainant has already paid premium for such facilitate; therefore, complainant cannot be lawfully compelled to take the possession without such promised amenities despite having paid premium for the same.
14. That the complainant have taken the home loan for this impugned unit for which regularly substantive amount of his

income is being paid as EMI to the bank which is too much of burden for complainant for a long time now. Also, complainant cannot think of any other home as his capital money and home loan eligibility is stuck in the project. Therefore, the complainant cannot be punished for the fault of the respondent company.

15. That the respondent company failed to deliver the possession in agreed timeframe and never bothered to intimate reasons and reasoning for the delay to the complainant. Therefore, the respondents have breached the sanctity of FBA. The Local Commissioner Report states that the license of the respondent company have lapsed in 2014 and there is no scope of completion of the said project in coming years. The email updates and the photos from the site also depicts the same picture.
16. That the respondent company is continuous and recurring defaulter and no respite is available against such a recurring either on justiciable or equitable ground. Any further extension to them will amount to travesty of justice as respondent company actions seems to take in bad faith and with ill motive to misappropriate complainant hard earned money and the respondent company is wilfully not maintaining the necessary information such as copy of the

RERA registration certificate, copy of lay out plan, sanctioned plan etc. on its website as mandated under Haryana Real Estate Regulatory Authority, Gurugram (Registration of Projects), Regulations, 2018. Therefore, it clearly shows the malafide intent of the respondent company wherein they are violating the law with impunity.

17. That there is an unexplained delay in handing over the possession by the respondent company to the complainant without any sign of them meeting the future deadline. Therefore, the complainant have genuine grievance which require the intervention of the Hon'ble Authority in order to do justice with them.
18. Without prejudice to the above, Hon'ble Authority shall order for granting possession immediately along with the interest for unreasonable delay at the prescribed rate in view of one of the mandatory obligations as provided under Section 18 of RERA Act, 2016 as well as on account of the acrimony of respondent company wherein they obliterated the trust reposed on them by complainant by handing over their hard earned money always on time and in accordance with the FBA. The Respondent company did not perform the required reciprocity which goes to very root of any bilateral agreement.

C. Relief sought by the complainant:

19. The complainant has sought following relief:
- (i) Direct the respondents to immediately deliver the possession of impugned Flat No.0704-F- 0903 of THE FERNHILL, Sector 91, Gurugram along with 24% per annum interest compounded quarterly for the delayed period of handing over the possession calculated till the date of delivery of possession as mentioned in the FBA.
20. The authority issued a notice dated 10.04.2021 of the complaint to the respondents by speed post and also on the give email address at fernhillgrievancesgurgaon@ansalapi.com and customerconnect@ansals.com . The delivery reports have been placed in the file. Thereafter, a reminder notice dated 17.06.2021 for filing reply was sent to the respondents on email address at fernhillgrievancesgurgaon@ansalapi.com and customerconnect@ansals.com . 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.
21. 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

22. 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.

23. 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."

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

5. POSSESSION OF FLAT: -

5.1 Subject to Clause 5.2 and further subject to all the buyers/allottees of Flats in the said residential project, making timely payment, the company shall endeavor to complete the 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 building plan whichever is later."

25. 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 application, 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 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 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 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.

26. **Admissibility of grace period:** The promoters have proposed to hand over the possession of the flat 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 building plan whichever is later. For what purpose such grace period of 6 months is asked for, is also not stated. As a matter of fact, the promoters have not applied for occupation certificate within the time limit prescribed in the flat buyer agreement. 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.

27. **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.

28. 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."

29. 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%.
30. 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;"*

31. 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.
32. 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 30.07.2013, the possession of the subject apartment was to be delivered within 48 months from the date of commencement of construction i.e. 14.08.2014. 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 14.08.2018. 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., 14.08.2018 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

33. 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., 14.08.2018 till the date of handing over of possession.
- ii. The arrears of such interest accrued so 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.

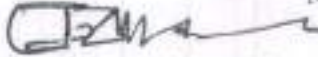
- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondents/promoters which is the same rate of interest which the promoter 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 respondent shall not charge anything from the complainants which is not the part of the agreement, however, holding charges shall not be charged by the promoter 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.

34. Complaint stands disposed of.

35. 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 13.10.2021.



HARERA
GURUGRAM