



HARERA
GURUGRAM

HARYANA REAL ESTATE REGULATORY AUTHORITY
GURUGRAM

New PWD Rest House, Civil Lines, Gurugram, Haryana

नया पी.डब्ल्यू.डी. विश्राम

गृह, सिविल लाईंस, गुरुग्राम, हरियाणा

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

**Complaint No. : 1153/2020
Date of Decision : 14.09.2021**

**Shri Aviral Maheshwari
R/o 218, Time Tower Building
M G Road, Gurugram,
Gurugram**

Complainant

V/s

**M/s Almond Infrabuild Pvt Ltd.
711/92, Deepali, Nehru Place
New Delhi-110019**

Respondent

**Complaint under Section 31
of the Real Estate(Regulation
and Development) Act, 2016**

Present:

**For Complainant:
For Respondent:**

**Mr. V K Bansal, AR
Mr. M K Dang, Advocate**

ORDER

This is a complaint filed by Shri Aviral Maheshwari,(also referred as buyer) under Section 31 of The Real Estate(Regulation and Development) Act, 2016 (in brief 'The Act') read with rule 29 of the

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Haryana Real Estate(Regulation and Development) Rules, 2017 against M/s Almond Infrabuild Pvt Ltd. etc.(also called as promoter) seeking, directions to refund a sum of Rs.1,17,65,210/- alongwith interest @12%p.a. calculated upto 30.01.2020 which comes to Rs.27,05,996/-. In addition to this, the complainant has also sought a sum of Rs.1,00,000/- as compensation and Rs.75,000/- towards costs of litigation.


2. Brief facts of the complainant's case are that same applied for booking of a residential unit in the project of the respondent known as "ATS Tourmaline" Sector 109, Gurugram. Initially he paid a sum of Rs.51,80,000/- on 27.08.2013 towards booking of unit bearing No.5211, Ist Floor, Tower-5 measuring 1750 sq ft. which was allotted to him on 30.08.2014, under construction linked payment plan. Apartment Buyer's Agreement(ABA) between the parties was executed on 30.08.2014. As per clause 6.2 of the ABA, the due date of offer of possession was 02.03.2018 i.e. 42 months of executing the ABA. Thereafter, on demands raised by the respondent, the complainant was making timely payment towards the allotted unit. The complainant has paid a sum of Rs.1,17,65,210/- against total sale consideration of Rs.1,43,56,250/-.

3. Despite payment in time, the respondent did not complete the project/ unit and hence complainant requested for refund of amount already paid by him as mentioned above, along with compensation of Rs. 1,00,000/- further Rs. 75,000/- as cost of litigation.

4. Details of the complaint's case in tabular form are reproduced as under:

Project related details		
I.	Name of the project	"ATS TOURMALINE"

II.	Location of the project	Sector 109, Gurugram
III.	Nature of the project	Residential
Unit related details		
IV.	Unit No. / Plot No.	5211 First Floor
V.	Tower No. / Block No.	5
VI	Size of the unit (super area)	Measuring 1750 sq ft
VII	Size of the unit (carpet area)	-DO-
VIII	Ratio of carpet area and super area	-DO-
IX	Category of the unit/ plot	Residential
X	Date of booking(original)	27.08.2013
XI	Date of Allotment(original)	30.08.2014
XII	Date of execution of BBA (copy of BBA be enclosed)	30.08.2014
XIII	Due date of possession as per BBA	42 months from the date of BBA i.e. 02.03.2018
XIV	Delay in handing over possession till date	
XV	Penalty to be paid by the respondent in case of delay of handing over possession as per clause	
Payment details		
XVI	Total sale consideration	Rs. 1,43,56,250/-
XVII	Total amount paid by the complainants	Rs.1,17,65,120/-


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5. Contesting the claim of the complainant, the respondent raised preliminary objection regarding maintainability of present complaint. It is alleged that Apartment Buyer's Agreement was executed between the parties prior to the enactment of the Act of 2016 and provisions of this Act cannot be enforced retrospectively. Moreover, clauses 21.1 & 21.2 of ABA/BBA provided to refer the matter for arbitration, in the event of any dispute. On these reasons, complaint could not have been filed before this forum.

6. It is again the plea of respondent that the complainant was not making timely payments and thus same has violated the terms and conditions of ABA, as were agreed by him vide clause 25.1 of the ABA. On account of continuous defaults on the part of complainant, the respondent was constrained to terminate the allotment of unit in question vide letter dated 20.10.2018. The amounts paid by the complainant towards earnest money alongwith other requisite charges as per terms, were forfeited. The complainant, on receipt of termination letter, approached the respondent for restoration of unit in question and assured the respondent to abide the terms of the ABA in making remaining payments. Though, the possession of unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of ABA subject to the 'force majeure event. Clause 1 of ABA, gives the respondent extension of time to complete the project. It was endeavour of respondent to complete the project/unit in a timely manner as per terms and conditions of ABA and hence no default whatsoever has been committed by it.

7. It is further averred by the respondent that project was badly affected on account of an order dated 23.04.2014 passed by the SDM, Kapashera, restraining the respondent from construction work, till demarcation of the land on which the project was being constructed.

Ultimately the restraint order was vacated on 12.10.2017. In this way, the respondent was prevented from completing its work as per sanctioned plans or in providing common services in the affected area. The circumstances were beyond its power and control i.e. 'force majeure'. As soon as the restraint order dated 23.04.2014 was set aside, the respondent completed the project and applied for grant of occupancy certificate before the competent authority on 19.03.2018. Occupancy certificate was received on 09.08.2019 and it offered the possession to the complainant on the same day i.e. 09.08.2019. The complainant is bound to take physical possession of the offered unit by completing the documentation formalities and by making remaining payments. In the opinion of respondent, the relief sought by the complainant is liable to be rejected.

8. As mentioned above, the respondent raised preliminary objection regarding maintainability of present complaint. According to it, Apartment Buyer Agreement(ABA) was executed between the parties on 30.08.2014. The Act had not come into force at that time. It is not denied by the respondent even that the project in question was neither complete nor any occupation certificate had been applied / received till the date, when the act came into force. In this way, the provisions of the act applied to the project in question same being an ongoing project.

9. According to respondent, there was an arbitration clause in ABA and in place of approaching for appointment of arbitrator, the complainant approached this forum. This plea was not stressed by counsel for respondent of during deliberations. Even otherwise, none of parties appeared serious on the clause of appointment of arbitrator. Even respondent preferred to cancel the allotment of apartment in question, on ground of non payment, without resorting to appointment of arbitrator. Moreover, provisions of the Act of 2016 efficaciously deal with rights and

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obligations of builder as well buyer. Being special act, provisions of the Act get preference over agreement between the parties.

9. Coming to merits of the case, it is contended by counsel for respondent that even if it had agreed to handover possession of unit in question within 42 months of execution of ABA / BBA, the same could not complete construction due to stay order passed by the SDM, Kapashera on 23rd March 2014. On the basis of report submitted by Halka Patwari (Revenue Officer) Kapashera, the matter was ultimately disposed off by High Court on 12.10.2017. In this way, the construction could not be commenced during this period i.e. 23.07.2014 to 12.10.2017. Even otherwise, according to learned counsel, his client applied for occupation certificate through application dated 19.03.2018 and it was received on 09.08.2019, the respondent offered possession of unit in question to the complainant vide letter dated 09.08.2019 itself, subject to clearance of payment.

11. On the other hand, it is contended by the learned counsel for complainant that the order of SDM, Kapashera (if any) was no hurdle in raising of construction of project or the unit in question, as it was dispute about boundary of Haryana and Delhi. At the most, the construction of boundary wall of the project could have been affected by that order, but not the building. The respondent is malafidely and deliberately taking shelter in said order.

12. It is not denied by the counsel for respondent that aforesaid matter was related to demarcation of boundaries between Union Territory of Delhi and the state of Haryana. It is averred by the respondent even in its reply..... the respondent can complete the **remaining project which was not affected by the stay order failing which however delay would have occurred.** It is not clarified by any of the parties, as when said order of

stay by the SDM was vacated. The respondent has put on file copy of order dated 12.10.2017 passed by Hon'ble High Court in case titled as Dilbagh Singh vs GNCTD. According to it, the matter was dismissed by High Court, when none appeared on behalf of petitioner. It is not clear as to what was the petition, which was dismissed by the High Court vide its order dated 12.10.2017. The respondent can not claim benefit of said order, passed by SDM, Kapashera or the High Court.

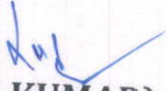
13. As stated earlier, the respondent was obliged to handover possession of unit in question within 42 months of execution of ABA, which was executed between the parties on 30.08.2014. counting in this way, the date of possession comes to 02.02.2018. As per respondent, it offered possession of unit in question to the complainant on 09.08.2019 i.e. after about 1-½ years of due date. The respondent is stated to have terminated the allotment of apartment, belonging to the complainant vide letter dated 20.10.2018. Despite being at fault for not completing the project or apartment in time, the respondent opted to terminate the allotment: Even otherwise, it is beyond comprehension that on one hand, the respondent cancelled the allotment but at the same time, claims to have offered possession of apartment to the complainant.

14. On the basis of above discussion, it is well established that the respondent failed to handover possession of the allotted unit to the complainant in time, the complainant on its turn, is well within his right to ask for refund of amount, along with interest and compensation. The complaint in hands is thus allowed. Respondent is directed to refund the amount received from complainant i.e. Rs.1,17,65,120/- within 90 days from today, along with interest @9.3% per annum from the date of each payment till realisation of amount. In addition to this, the respondent is directed to pay Rs. 50,000/- as costs of litigation to the complainant

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16. File be consigned to the Registry.

14.09.2021


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

Judgement uploaded on 26.10.2021.