

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

Complaint no. : 6492 of 2019
First date of hearing : 19.02.2020
Date of decision : 20.07.2021

1. Ashish Lomesh
2. Munish Lomesh
Both RR/o: H.no- 1225, Sector-17, Faridabad

Complainants

M/s Ashaina Landcraft Realty Pvt. Ltd.
R/o: 3H, Plaza M6, Dist. Center Jasola, New
Delhi- 110025

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Shri Dhruv Dutt Sharma
Shri S.M. Ansari

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 12.12.2019 has been filed by the complainants/allottees in Form CRA 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 agreement for sale executed inter-se them.

2. Since, the buyer's agreement has been executed on 10.12.2014 i.e., prior to the commencement of the Act ibid, therefore, the penal proceedings cannot be initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of statutory obligation on part of the promoter/respondent in terms of section 34(f) of the Act ibid.

A. Project and unit related details

3. The particulars of the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession, delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	The Center Court, Sector-88A, village Harsaru, Pataudi Road, Gurgaon, Haryana.
2.	Project area	14.025 acres
3.	Nature of the project	Group housing colony
4.	DTCP license no. and validity status	46 of 2013 dated 08.06.2013 valid upto 07.06.2019
5.	Name of licensee	M/s Gabino Developers Pvt. Ltd & 3 others.
6.	HRERA registered/ not registered	Registered
7.	Registration number	46 of 2017 dated 11.08.2017 valid up to 30.06.2020.
8.	Occupation certificate	Not obtained
9.	Provisional allotment	11.09.2014 (page 54 of complaint)
10.	Unit no.	Unit no: A-214, 2 nd floor, tower T4 (page 54 of apartment buyer agreement)
11.	Unit measuring	1565 sq. ft.
12.	Date of execution of buyer's agreement	10.12.2014 (Page 65 of apartment buyer

		agreement)
13.	Payment plan	Construction linked payment plan (Page 100 of apartment buyer agreement)
14.	Total consideration as per payment plan	Rs.1,02,20,335/- as per payment plan (Page 100 of complaint)
15.	Total amount paid by the complainants	Rs.1,05,30,811 /- as per applicant ledger (page 174 of complaint)
16.	Due date of delivery of possession as per clause 11.2 of the said agreement i. e. 42 months and a grace period of 6 months from the date of this agreement and shall thereafter apply for grant of the occupancy certificate and on receipt of the same will offer possession of the said apartment to the allottee.	10.06.2018. [Note: Grace period is not allowed]
17.	Offer of possession to the complainants	Not offered
18.	Delay in handing over possession till date of decision i. e. 20.07.2021	3 years 1months 10 days

B. Facts of the complaint

The complainants have made following submissions in the complaint:

- That on 08.07.2013 complainants registered their expression of interest with the respondent to seek priority in allotment of a residential unit in the forthcoming project of the respondent and paid Rs. 5,00,000/- through cheque bearing no. 425647 dated 08.07.2013 drawn on Yes bank towards advance registration. The

complainants also paid a sum of Rs. 11,45,605/- to Ashiana Landcraft Realty Pvt. Ltd. i.e., respondent.

5. That the respondent induced the complainants with tall claims and believing their representations to be true and correct, the complainants vide application dated 03.05.2014 applied for allotment of apartment and accordingly paid another sum of Rs. 1,96,534/-. As on 07.05.2014 the complainants have paid a sum of Rs. 18,42,139/- towards the booking amount. The total cost of the apartment was Rs 1,06,09,061/- including taxes and external development charges, infrastructure development charges, preferential location charges, IFMS, complex club development charges and parking.
6. A provisional allotment letter dated 11.09.2014 was issued by the respondent, wherein the complainants were provisionally allotted a residential apartment bearing no. A-214, 2nd floor, tower T4 in the aforesaid project. The respondent in order to dupe the complainants in their nefarious net executed apartment buyer agreement dated 10.12.2014 with the complainants, just to create a false belief that the project shall be completed in time bound manner and in the grab of this agreement persistently raised demands due to which they were able to extract huge amount of money from the complainants. Subsequently, the respondent raised various demands time to time from the complainants which were regularly paid by the complainants and have also been acknowledged by various receipts issued by the respondent. As such till date, the complainants have paid a sum of Rs 1,05,30,168/- i.e., approx. 100% of the total sale consideration. It is pertinent to mention here that despite paying such huge

amount, the complainants were never apprised about the actual development status by the respondent despite repeated requests. As per clause 11.2 of the agreement, the possession of the apartment was to be offered within a period of 42 months plus grace period of 6 months from the date of the agreement. Even after depositing 100% of the total sale consideration, the complainants till date have not been offered possession of the said apartment.

7. The last payment was made by the complainants on 25.06.2017 and thereafter the complainants have made numerous calls and visits to the respondent asking them to give the possession of the apartment, but the respondent has been avoiding the complainants on one pretext or the other. The complainants after getting no satisfactory reply from the respondent visited the said project to enquire about the status of the project however, the complainants were shocked to see the construction of the project had not even been completed and the entire project is lying unfinished and far away from completion.
8. That finding no other way the complainants on 07.09.2019 sent a letter dated 31.08.2019 to the respondent to enquire about the status of the possession of the apartment. The said letter was sent through speed post on the complete and correct address of the respondent and the said letter was delivered to the respondent. The aforesaid acts of the respondent only suggest that respondent has a clear motive to dupe the complainants and they do not intend to give possession of the said apartment even in near future.

9. As per clause 11.4 of the agreement, if the respondent fails to complete the construction within the stipulated period, it shall be liable to pay compensation @ Rs. 5/- per month per sq.ft. of the super built up area of the apartment for every month of delay. However, it is submitted that the compensation offered by the respondent is not in line with the provisions of the Real Estate (Regulation & Development) Act, 2016.
10. That the conduct of the respondent has resulted in wrongful loss to the complainants and wrongful gain to the respondent herein, for which the respondent is even liable to be prosecuted under India Penal Code.

C. Relief sought by the complainants

11. The complainants have filed the present compliant for seeking following reliefs:
 - i. Direct the respondent to pay interest for the delay in possession to the complainants in the form of interest at prescribed rate of interest on the amount paid to the respondent, from the promised date of delivery of the flat till the actual physical possession.
12. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act and to plead guilty or not to plead guilty.

D. Reply by the respondent

13. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:
 - i. That the complainants out their own free will and volition approached the respondent through broker namely "Prop



Tiger' and submitted the "Expression of Interest" dated 08.07.2013 expressing their willingness to book an apartment in the forthcoming/upcoming projects in Gurgaon and made payment of Rs 5,00,000/- vide cheque bearing no. 425647 dated 08.07.2013 drawn on Yes Bank, Faridabad. The complainants were duly informed vide letter dated 22.03.2014 of the respondent that all major regulatory approvals have been received with respect to the project namely "The Centre Court" situated at sector 88A, village Harsaru, Pataudi Road, Gurugram, Haryana.

- ii. That the project "The Centre Court" at sector 88A, Dwarka Expressway, Gurugram is being developed by the respondent. In due compliance of the provisions of Real Estate (Development & Regulation) Act, 2016, the aforementioned project has registered under RERA having registration no. 46 of 2017 and the said registration is valid for a period commencing from 11.08.2017 to 30.06.2020. The respondent is duly following all the mandates and provisions of the Act of 2016 without any failure. The complainants were duly intimated vide letter dated 22.03.2014 that in view of the expression of interest have been allotted with priority number 262 and were further requested by the respondent to choose the apartment of their selection by visiting the sales office of the respondent to complete the booking formalities.
- iii. It is most respectfully submitted that all the concerns raised by the complainants were duly responded by the respondent herein. Pertinently, upon being satisfied and getting response to all their queries to their complete satisfaction including



understanding of all the terms and conditions about the entire project conditions, the complainants have submitted the application form on 03.05.2014 opting for construction linked payment plan and also paid an amount of Rs 1,96,534/- vide cheque bearing no. 425653, dated 07.05.2014 drawn on Yes Bank, Faridabad. Based on the expression of interest and above said application, respondent issued the letter of provisional allotment dated 11.09.2014 and provisionally allotted flat bearing no. A-214, second floor, tower T4 in the said project. Further, on 10.12.2014 an apartment buyer's agreement was executed between the complainants and the respondent herein.

- iv. That the said allotment letter and the said agreement also contained the schedule of payment plan, and the complaints were under an obligation to adhere to the said payment plan. However, the complainants have frequently, defaulted to adhere to the said payment plan. It is most respectfully submitted before this hon'ble authority that despite receiving various reminders and demand letters sent by the respondent demanding the outstanding payments, complainants have failed to adhere to the said payment plan opted. It is submitted that the said amounts to breach of terms of the said agreement.
- v. It is pertinent to mention herein that vide letter dated 16.02.2015, respondent waived the interest of Rs. 50,776/- which was accumulated on account of delay in making payment of instalments. It is further submitted herein that the complainants again failed to make payment of instalment



in time. It is submitted that since the complainants have failed to make the payment of the due instalments in terms of the payment plan as opted thus, they have violated the terms of clause 3.4 of the apartment buyer agreement.

- vi. All the queries of the complainants were duly resolved by the respondent and the respondent being a customer-oriented company agreed to various demands/request of the complainants. It is further pertinent to mention here that the respondent vide their letter dated 04.05.2017 requested the complainants to clear the outstanding dues of Rs. 10,95,704/, it was further offered by the respondent that if the complainants make the payment by 31.05.2017, then in that case the respondent will waive the amount of interest.
- vii. It is submitted that as per clause 11.2 of the apartment buyer agreement subject to timely payment by the allottees as well as subject to force majeure, the construction of the apartment was to be completed within 42 months plus 6 months grace period from the date of the execution of the agreement. It is pertinent to mention herein that the construction of the project was stopped several times during the year 2016, 2017, 2018 and 2019 by the order of EPCA, HSPCB, NGT and the Hon'ble Supreme Court of India.
- viii. It is pertinent to mention herein that the complainants have defaulted several times in making payment of instalments. Thus, complainants are not entitled to seek timely possession of the flat. It is further pertinent to mention herein that even after delay in making payment by the complainants and order of the EPCA, HSPCB and the apex court, respondent have



finished major portion of the construction work has already been completed. It is submitted that till date the respondent has waived the interest of Rs 3,59,497/-

- ix. It is submitted that the money received from the complainants/allottees have been utilized towards the construction of the project. it is further pertinent to mention here that during the last three years, real estate sector has seen several events such as demonetisation, the Act of 2016 goods and service tax which severely impacted the real estate sector. It is further pertinent to mention here that the construction works of the project is going on at full swing despite of the financial obstacles dues to economic slowdown. It is most respectfully submitted that 72% of the construction cost is already being incurred as on date and major portion of the construction work has already been completed. It is further submitted that since the money paid by the allottees have only been utilized for construction of the project thus, it is not feasible for the respondent to pay back the amount as sought for, since the project is nearing completion, thus the respondent propose the complainants to wait till possession as refund of the amount will cause severe loss to the project and other allottees who are eagerly waiting for the possession of their respective flat. The respondent vide email dated 04.06.2019, apprised the complainants with respect to the development of the Dwarka Expressway and about the factors which affected the real estate industry.
- x. That the complainants are not consumers since they have invested in the project only for commercial purposes.



Therefore, the jurisdiction of the hon'ble authority, cannot be invoked as there is no cause of action which arouse within the jurisdiction of the hon'ble authority. Since the amount paid upon submitting the EOI was an investment for commercial purpose, the complainants are not consumers. Therefore, the complainants are not consumers. Therefore, the complaint is liable to be dismissed being not maintainable. Under these circumstances, it is all the more necessary for the complainants, on whom the burden lies, to show how the complainants are consumers. The complainants have prayed for reliefs which otherwise have to be claimed in a suit for damages and recovery, after paying appropriated court fee. That in order to avoid the payment of court fee, the complainants have raised a dispute of a civil nature, which requires elaborate evidence to be led and which cannot be adjudicated upon under the summary jurisdiction of this hon'ble authority, in this view of the matter, the complaint is liable to be dismissed with costs.

- xi. The dispute between the parties involves complicated questions of facts and law, which necessarily entail the leading of copious evidence. The issues raised by the complainants cannot be addressed in a complaint before this hon'ble authority which follows a summary procedure. In this view of the matter, the complaint is liable to be dismissed.
- xii. In view of aforementioned facts, it is submitted that the captioned complaint is frivolous, vague and vexatious in nature. The captioned complaint has been made to injure the

interest and reputation of the respondent and therefore, the instant complaint is liable to be dismissed in limine.

14. 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 on the basis of these undisputed documents.

E. Jurisdiction of the authority

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act of 2016 leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent.

F.I Objection regarding delay due to force majeure

15. The respondent/promoter has sought further extension for a period of 6 months after the expiry of 42 months for applying of occupation certificate and on receipt of the same was to be made offer of possession of the said apartment to the allottees. The respondent raised the contention that the construction of the project was delayed due to *force majeure* conditions including non-payment of instalments by different allottees of the project, various orders passed by the EPCA, HSPCB and the apex court. Moreover, several events such as demonetization, Real Estate (Regulation and Development) Act, GST etc. which severely impacted the real estate sector. It was observed that due date of possession as per the agreement was 10.06.2018 wherein the event of demonetization occurred in November 2016. By this time, major construction of the respondent's project must has been at

an advanced stage as per timeline mentioned in the agreement executed between the parties. Therefore, it is apparent that demonetization could not have hampered the construction activities of the respondent's project that could lead to the delay more than 3 years. Thus, the contention raised by the respondent in this regard is rejected. Further, the respondent has not given any specific details with regard to delay in payment of instalments by many allottees or regarding the impact of Real Estate (Regulation and Development) Act, 2016 and GST. The other force majeure conditions mentioned by the respondent are of usual nature and the same could not have lead to delay of more than 3 years in completing the project Therefore, the respondent cannot be allowed to take advantage of its own wrongs/faults/deficiencies.

G. Findings on the relief sought by the complainants

G.I Delay possession charges

Relief sought by the complainants: Direct the respondent to pay interest for the delay in possession to the complainants in the form of interest at prescribed rate of interest on the amount paid to the respondent, from the promised date of delivery of the flat till the actual physical possession.

16. In the present complaint, the complainants intends to continue with the project and are seeking delay 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."

17. Clause (11.2) of the apartment buyer agreement provides for time period for handing over of possession and is reproduced below:

The company, based on its present plans and estimates and subject to force majeure and all just exceptions and conditions beyond control of the company and the allottee making timely payments, shall endeavour to complete the construction work of the said apartment/building thereof within a period of 42 months and a grace period of six months from the date of this agreement ("completion date") and shall thereafter apply for grant of the occupancy certificate and on receipt of the same will offer possession of the said apartment to the allottee.

18. 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 the complainants not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of their 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 allottees are left with no option but to sign on the dotted lines.

19. **Admissibility of grace period:** The promoter has proposed to handover the possession of the said unit within 42 months from the date of execution of agreement or fulfilment of the pre-conditions imposed thereunder. The respondent promoter has sought further extension for a period of 6 months after the expiry of 42 months for unforeseen delays in respect of the said project for applying of the occupation certificate and on receipt of the same will further offer the possession of the said apartment and the respondent has failed to provide any document as to application of occupation certificate within the grace period of 6 months. Therefore, the respondent has not fulfilled the precondition for availing the benefit of grace period of 6 months. As the respondent has failed to fulfill the precondition therefore, they cannot be granted the benefit of grace period of 6 months. Moreover, the respondent raised the contention that the construction of the project was delayed due to *force majeure* which were beyond the control of the respondent promoter. Also, the allottees should not be allowed to suffer due to the fault of the respondent promoter. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved by the promoter themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottees. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some

compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoter has not assigned such compelling reasons as to why and how it is entitled for further extension of time 6 months in delivering the possession of the unit. Accordingly, this grace period of 6 months cannot be allowed to the promoter at this stage.

20. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession. However, proviso to section 18 provides 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 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.

21. The legislature in its wisdom in the subordinate legislation under the 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.

22. 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., 20.07.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

23. The definition of term 'interest' as defined under section 2(z) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, 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;"*

24. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

25. On consideration of the circumstances, the evidence and other record and submissions made by the complainants and the

respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 11.2 of the apartment buyer agreement executed between the parties on 10.02.2014, possession of the said unit was to be delivered within a period of 42 months from the date of execution of agreement i. e. 10.02.2014. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession out to be 10.06.2018. The six months of grace period is not allowed as the respondent has not applied for occupation certificate till date.

26. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 10.06.2018 till handing over of possession as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G. Directions of the authority


27. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent is directed to pay the interest at the prescribed rate i. e. 9.30 % per annum for every month of delay on the amount paid by the complainants from due date of possession i. e. 10.06.2018 till handing over of possession

after the date of receipt of valid occupation certificate as per section 18(1) read with rule 15.

- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest till the offer of possession shall be paid on or before 10th of each subsequent month as per rule 16(2) of the rules.
- iii. The complainants are also directed to make payment/ arrears if any due to the respondent at the equitable rate of interest i. e. 9.30% per annum.


28. Complaint stands disposed of.

29. File be consigned to registry.


(Vijay Kumar Goyal)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Samir Kumar)

Member

Dated: 20.07.2021

Judgement uploaded on 26.10.2021.