

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

Complaint no. : 6781 of 2019

Date of decision : 21.10.2021

VINOD KUMAR GUPTA
R/O : J-913, Jalvayu
Tower, Gurugram

Complainant

Versus

ALMOND INFRABUILD PVT. LTD.
ADDRESS: 711/92 Deepali,
Nehru Place, New Delhi- 110019

Respondent

APPEARANCE:

For Complainant:

Mr. Dinesh Kumar - Advocate.

For Respondent:

Mr. M.K. Dang - Advocate.

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ORDER

1. This is a complaint filed by Vinod Kumar Gupta (also called as buyer) under section 31 of The Real Estate (Regulation and Development) Act, 2016 (in short, the Act of 2016) read with rule 29 of The Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) against respondent/developer.
2. As per complainant, on 05.08.2013, he booked a flat in respondent's project **Tourmaline**, situated at sector-109, Gurugram and made payment of Rs 9,64,246 as booking amount. The respondent vide allotment letter dated 23.01.2014 allotted a flat to complainant, bearing unit No. 5181 admeasuring 1750 sq. ft. (super build up area) for a total consideration of Rs 1,43,66,750 including BSP, PLC, EDC etc. A buyer's agreement was executed on 23.01.2014 between parties.
3. As per Clause 6.2 of buyer's agreement, possession of said premisses was to be delivered within 42 months from the date of buyer's agreement. The respondent was obliged to send notice and offer of possession of the apartment to the complainant as and when the former receives the occupation certificate from competent authority. The respondent failed to complete the construction work and consequently to deliver possession to him (complainant).

4. As per demands raised by the respondent, he (complainant) made timely payment of Rs 76,01,025 by 30.01.2015 but to his utter dismay, possession of the apartment has not been offered, as assured by the respondent. The construction work was not as per scheduled attached with the buyer's agreement.
5. He (complainant) through his application dated 23.03.2015 requested respondent to cancel the allotment of subject unit and sought refund of his money. The same was duly acknowledged by the senior manager of respondent by marking endorsement on the bottom of cancellation application on 07.04.2015. However, despite various follow-ups, respondent did not refund the same. A senior officer of respondent, demanded a deed of cancellation pertaining to subject flat vide email dated 29.04.2015 and accordingly a deed of cancellation dated 01.05.2015 was submitted by the complainant.
6. In this way, the respondent has committed gross violation of the provisions of section 18(1) of the Act, and hence complainant is forced to file present complaint, seeking refund of entire amount of Rs 76,01,025 along with interest @ 18 % per annum, Rs 10,00,000 towards harassment and Rs 1,10,000 towards cost of litigation..

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

S.No.	Heads	Information
PROJECT DETAILS		
1.	Project name and location	Tourmaline , situated at sector-109, Gurugram,
2.	Project area	10.41 acres
3.	Nature of the project	Residential Group Housing Colony
4.	DTCP license no. and validity status	250 of 2007 dated 02.11.2007
5.	RERA Registered/ not registered	Registered vide registration No. 41 of 2017
UNIT DETAILS		
1.	Unit no.	5181
2.	Unit measuring	1750 sq. ft.
3.	Date of Booking	05.08.2013
4.	Date of Allotment	23.01.2014
5.	Date of Buyer's Agreement	23.01.2014
6.	Due Date of Delivery of Possession Clause 6.2 of buyer's agreement, possession of said premisses was to be delivered within 42	23.07.2017

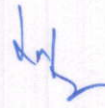
	months from the date of buyer's agreement. The company will send notice and offer of possession of the apartment to the applicant as and when the company receives the occupation certificate from competent authority	
7.	Delay in handing over of possession till date	4 years 03 month
PAYMENT DETAILS		
8.	Total sale consideration	Rs 1,43,66,750 /-
9.	Amount paid by complainant	Rs 76,01,025 /-
10.	Payment Plan	Construction linked Payment Plan

8. Respondent contested the claim by filing written reply dated 25.03.2021. It (respondent) took a preliminary objection that the provisions of Act of 2016 are not applicable to this case as the BBA was executed the parties prior to enactment of Act of 2016 and even the cancellation deed was submitted by the complainant prior to Act of 2016. The provisions of Act of 2016 cannot be enforced retrospectively. Further, complaint is not maintainable and the dispute should be resolved by

arbitration since the buyer's agreement contains arbitration clause i.e. Clause 21.1 and clause 21.2 of BBA. The complainant has executed BBA and is bound to adhere to the terms of the agreement. it is further contended that all the payment demands were raised as per the construction linked plan and only after completion of respective construction milestones.

9. It is averred that complainant vide letter dated 23.03.2015 requested for cancellation of unit on account of marital disharmony of his daughter and due to delay in obtaining license for his professional venture i.e. due to his financial constraints. No objection against alleged delay was raised by complainant at that time. The respondent as a goodwill gesture asked complainant to submit cancellation deed and intimated to refund the money, after deducting brokerage and service tax. The respondent had intimated to complainant that it shall refund the money back to complainant after resale of unit to a third party.

10. Moreover, construction work of tower in which unit of complainant is located has already been completed and occupation certificate dated 09.08.2019 for the project has already been obtained. Several allottees of project have been offered possession of their units. The allotment of the subject


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unit will be restored subject to payment of remaining amount by the complainant, towards the sale consideration.

11. Further, the complaint is barred by limitation as the request for cancellation of unit and cancellation deed was submitted in the year 2015 and accordingly time to file present complaint has been lapsed. Contending that complainant is trying to misuse the provisions of Act of 2016, respondent prayed for dismissal of complaint.
12. I have heard learned counsels for the parties and have perused the documents on record.
13. It is not plea of respondent that completion certificate was received when this Act of 2016 came into force. The respondent was obliged to apply for registration within 3 months. In this way, provisions of Act of 2016 are well applicable.
14. So far as contention of respondent with respect to arbitration clause is concerned, none of parties appeared serious about this provision. Even respondent did not invoke proceedings under Arbitration Act. Moreover, Act of 2016, being a special legislation for protection of interest of consumers in real estate sector, has overriding effect over other laws in existence, even over agreement between the parties.
15. The respondent has admitted that complainant had requested for cancellation of unit and sought refund of amount paid by

him vide his letter dated 23.03.2015. Despite complainant's request for cancellation respondent failed to refund the same till date.

16. The respondent has not disputed the payment of Rs 76,01,025 by the complainant towards the subject unit. The respondent has contended that the refund of the money will be made after deducting brokerage and service tax. As per clause 10.4 (i) of BBA, in case of termination on account of buyer's event of default, the developer shall, out of entire amounts paid by buyer to the developer till the cancellation date, forfeit the entire earnest money and any other dues payable by buyer including interest on delayed payments.

17. The Government of Haryana issued a notification on 05.12.2018 titled as Haryana Real Estate Regulatory Authority, Gurugram, (Forfeiture of earnest money by builder) Regulations, 2018 wherein it has been stated that forfeiture of the earnest money shall not exceed more than 10 % of consideration amount of real estate i.e. apartment /building as the case may be. In all cases where the cancellation of the unit is made by the builder in unilateral manner or buyer intends to withdraw from the project, any agreement containing any clause contrary to the aforesaid regulations shall be void and not binding on the buyer. Accordingly, while cancelling allotment in question, the respondent could forfeit some reasonable amount but not more than 10 % of sale consideration.

18. Complaint in hands, is accordingly allowed and respondent is directed to refund the amount paid by the complainant after deducting forfeitable amount as per Regulations, 2018 . Same is also directed to pay interest @ 9.3 % p.a. from the date of request of cancellation i.e. 23.03.2015, till realisation of amount. The respondent is burdened with cost of litigation Rs 50,000 to be paid to the complainant.

File be consigned to the Registry.

21.10.2021


(RAJENDER KUMAR)

Adjudicating Officer

Haryana Real Estate Regulatory Authority

Gurugram

Judgement uploaded on 28.10.2021.

HARERA
GURUGRAM