

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

Complaint no. : 1590 of 2021
Date of first hearing : 01.07.2021
Date of decision : 01.07.2021

1. Poonam Bhatia
2. Rajiv Bhatia

Both RR/o: H.no. 29, LIG Flats, Gayatri
Enclave, Dr. Ambedker Nagar, Near DTC
Depot., New Delhi-110062

Complainants

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:

Smt. Priyanka Agarwal
None

Advocate for the complainants
Advocate for the respondents

EX-PARTE ORDER

1. The present complaint dated 26.03.2021 has been filed by the complainants/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

- 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:

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	Residential 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. vide allotment letter dated 22.10.2011	N-0103, 1 st floor Admeasuring- 2321 sq. ft.

		[Page 21 of complaint]
7.	Payment plan	Construction linked plan [page 49 of complaint]
8.	Date of execution of flat buyer agreement	10.07.2013 [page 24 of complaint]
9.	Total consideration as per customer ledger account dated: 24.02.2021	Rs. 75,95,008/- [page 54 of complaint]
10.	Total amount paid by the complainants as per customer ledger account dated 24.02.2021	Rs. 70,47,004/- [page 60 of complaint]
11.	Commencement of construction	14.08.2014 (as per customer ledger dated 24.02.2021 at page 61 of complaint)
12.	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 being earlier i.e. 14.08.2014) (Grace period is not allowed)
13.	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.

3. That the complainants approached to the respondent for booking of an apartment admeasuring 2315 sq. ft. in " THE FERNHILL", Sector-91, Gurugram and paid booking amount Rs 1,99,999/- through cheques no. 269157, dated 17.10.2011.

whereby the buyer imposes unfair and discriminatory terms and conditions. That the complainants were subjected to unethical trade practice as well as subject of harassment, flat buyer agreement clause of escalation cost, many hidden charges which was forcedly imposed on buyer at the time of possession as tactics and practice used by builder guise of a blazed, arbitrary and discriminatory. In the Supreme Court of India Civil Appellate Jurisdiction **CIVIL APPEAL NO. 12238 of 2018 Pioneer Urban Land & Infrastructure Ltd. Appellant V/S Govindan Raghavan Respondent Order dated 2/04/2019** Wherein the SC bench held that:

Para 9:

We see no illegality in the Impugned Order dated 23.10.2018 passed by the National Commission. The Appellant Builder failed to fulfill his contractual obligation of obtaining the Occupancy Certificate and offering possession of the flat to the Respondent Purchaser within the time stipulated in the Agreement, or within a reasonable time thereafter. The Respondent Flat Purchaser could not be compelled to take possession of the flat, even though it was offered almost 2 years after the grace period under the Agreement expired. During this period, the Respondent Flat Purchaser had to service a loan that he had obtained for purchasing the flat, by paying Interest @10% to the Bank. In the meanwhile, the Respondent Flat Purchaser also located an alternate property in Gurugram. In these circumstances, the Respondent Flat Purchaser was entitled to be granted the relief prayed for i.e. refund of the entire amount deposited by him with Interest.

Para-7 In view of the above discussion, we have no hesitation in holding that the terms of the Apartment Buyers Agreement dated 08.05.2012 were wholly one-sided and unfair to the Respondent Flat Purchaser. The Appellant Builder could not seek to bind the Respondent with such one-sided contractual terms.

4. That the complainants were allotted the apartment no. N-0103 tower-N, admeasuring 2315 sq. ft. in " THE FERNHILL", Sector-91, Gurugram, Haryana, dated 22.10.2011.
5. That the respondent to dupe the complainants in their nefarious net even executed a one-sided flat buyer agreement signed between complainants and M/S Ansal Properties & Infrastructure Limited and M/s Samyak Projects Private Limited, on dated 10.03.2013(*sic 10.07.2013*), 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 complainants.
6. That the total cost of the said flat is Rs. 75,95,008/- and a sum of Rs. 70,47,004/- has been paid by the complainants which is more than 95% of total sale consideration. The respondents raised various amounts without doing appropriate work on the said project which is illegal and arbitrary.
7. That the one-sided development agreement and inordinate delay in possession has been one of the core concerns of home buyers. The terms of the agreement are non-negotiable and buyers even if they do not agree to a term, there are no option of modifying it or even deliberating it with the builder. This aspect has often been unfairly exploited by the builder,

8. That the respondents were liable to hand over the possession of the said unit before 10.03.2017 which is so far from completion. As per buyer's agreement clause no 5.1

"5.1 Subject to Clause 5.2 and further subject to all the buyers' allottees of the Flats in the said Residential Project, Making timely payment the company shall endeavour to complete the development 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 the building plan whichever is later."

That as per construction status and absence of basic amenities respondents will take more time to give physical possession after getting occupation certificate.

9. That the builder in last 10 years, many times made false promises for possession of flat and current status of project is still desolated and raw even not 70% completed. The builder breaches the trust and agreement. That as per section 19 (6) of Act of 2016, complainants have fulfilled their responsibility in regard to making the necessary payments in the timely manner and within the time specified in the said agreement. Therefore, the complainants herein are not in breach of any of its terms of the agreement. Further, the respondents executed flat buyer's agreement which is one sided and forcibly imposed many unilateral charges.

10. That the respondents have to charge interest on in delayed instalment @ 24 % p.a. compounded quarterly as per clause 4.5 of flat buyer's agreement and offer the delay penalty for just Rs 10 Rs per sq. ft per month as per clause no 5.5 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 flat buyer's agreement with a malicious and fraudulent intention and caused deliberate and intentional huge mental and physical harassment of the complainants and his family has been rudely and cruelly dashed the savoured dreams, hopes and expectations of the complainants 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 trick to extract more and more money from complainants pocket seems and that the same is evident from the irresponsible and desultory attitude and conduct of the respondent, consequently injuring the interest of the buyers including the complainants who have spent his entire hard earned savings in order to buy this home and stands at a crossroads to nowhere. 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.

13. That due to the malafide intentions of respondent and non-delivery of the flat unit the complainants have accrued huge losses on account of the career plans of their family member and themselves and the future of the complainants 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 complainants also took loan from ICICI and have been paying EMI and due to such delay in possession complainants have compulsion to stay in rented property. EMI and rent of house created an extra financial burden on complainants.

C. Relief sought by the complainants:

14. The complainants have sought following relief:
- (i) Direct the respondents to provide the possession and interest for every month of delay at the similar rate of interest i.e. 24% as charged by builder in case of delay penalty.
15. The authority issued a notice dated 26.04.2021 of the complaint to the respondents by speed post and also on the

give email address at fernhillgrievancesgurgaon@ansalapi.com, esenciagrievancesgurgaon@gmail.com & info@ansalapi.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@ansalsapi.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.

16. 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 complainants.

D. Jurisdiction of the authority

17. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

D.I Territorial jurisdiction

18. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram



shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram District, therefore this authority has complete territorial jurisdiction to deal with the present complaint.

D.II Subject matter jurisdiction

The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per the 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 complainant at a later stage.

E. Findings on the relief sought by the complainants

Relief sought by the complainants: Direct the respondents to provide interest for every month of delay at the similar rate of interest i.e. 24% as charged by builder in case of delay penalty.

19. In the present complaint, the complainants 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 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 endeavour to complete 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."

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 and application, 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 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.

22. **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. Also, 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.

23. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are 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(z) 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:

"(z) "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 complainants 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 complainants 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 10.07.2013, 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

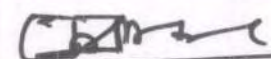
29. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoters as per the functions entrusted to the authority under section 34(f):

- 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., 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.
- iii. The respondents are directed to pay 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.

- iv. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
- v. The rate of interest chargeable from the allottees 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 promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(z) of the Act.
- vi. The respondents shall not charge anything from the complainants which is not the part of the agreement.
30. Complaint stands disposed of.
31. 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