

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

**Complaint no. : 4639 of 2020**  
**Date of decision : 25.10.2021**

RAJESH JINDAL  
R/O : 267, Great India  
Apartments, Plot No-15,  
Dwarka, New Delhi-110075

**Complainant**

Versus

ASHIANA DWELLINGS PVT. LTD.  
ADDRESS: 5F, Everest 46/C,  
Chowrinhgee Road, Kolkata,  
W.B.- 700071

**Respondent**

**APPEARANCE:**

For Complainant:

Mr. Sukhbir Yadav Advocate

For Respondent:


Mr. S. M. Ansari Advocate

  
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## ORDER

1. This is a complaint filed by Mr. Rajesh Jindal (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, he booked a flat in respondent's project "**Ashiana Mullberry**", situated at sector-2, Sohna Road, Gurugram on 07.06.2015, and made payment of Rs 6,00,000 as booking amount. The respondent issued a provisional allotment letter dated 08.03.2016 and allotted unit No. B-507 in Tower T 2 admeasuring 1465 sq. ft. for a total consideration of Rs 77,97,420 /- , including BSP, EDC, IDC with taxes etc. A builder buyer agreement (BBA) was executed in this regard on 08.03.2016.
3. The complainant vide email dated 19.02.2016 sought correction in the payment plan and stated that current payment plan was not as per discussion between them. The respondent vide email dated 19.02.2016, replied that the payment plan is same as mentioned in application form i.e. performance linked payment plan, as there were only two

  
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payment plans i.e. performance linked payment plan and subvention linked payment plan.

4. As per Clause 11.2 of buyer's agreement, possession of the unit was proposed to be delivered within 39 months from the date of execution of buyer's agreement or start of construction, after the grant of Environmental Clearance by MOEF whichever is later, with 6 months grace period. The respondent failed to complete construction work and consequently failed to deliver possession of the unit, till date.
5. The complainant availed home loan facility from ICICI Bank which later on was switched to HDFC Bank. The respondent allowed permission to mortgage in favour of HDFC bank on 08.07.2020.
6. He (complainant) has paid all dues as demanded by the respondent from time to time. When he enquired about progress of the construction, the respondent failed to provide any clear date of completion of the project to him (complainant). He visited the project site on 06.11.2020 and found that project was far from completion infact, construction work of the tower in which his unit is situated has not even started. The respondent has failed to obtain occupation certificate. He (complainant) has paid Rs



- 56,79,936 i.e. 72 % of entire agreed consideration along with miscellaneous and additional charges etc on time.
7. As per details available on website of MCA/ROC, there were two directors of the company Rohit Raj Modi and Mayank Raj Modi, and after resignation of both the directors, there is no active director in the company, which is violation of the statutory requirement.
8. As respondent has committed gross violation of the provisions of section 18(1) of the Act by not handing over the timely possession of the unit in question, the complainant has prayed for refund of entire amount of Rs 56,79,936 along with interest at prescribed rate.
9. The particulars of the project are reproduced here as under in tabular form:

S.No.	Heads	Information
<b>PROJECT DETAILS</b>		
1.	Project name and location	"Ashiana Mullberry", Sector 2, Sohna, Gurugram, Haryana
2.	Project area	10.25 acres
3.	Nature of the project	Group Housing Colony
4.	DTCP license no. and validity status	16 of 2014 dated 10.06.2014 valid upto 09.06.2019

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5.	RERA Registered/ not registered	Registered vide no. 44 of 2017 dated 11.08.2017
<b>UNIT DETAILS</b>		
1.	Unit No.	B-507
2.	Unit measuring	1465 sq. ft.
3.	Date of Booking	07.06.2015
4.	Date of Allotment Letter	08.03.2016
5.	Date of Buyer's Agreement	08.03.2016
6.	Due Date of Delivery of Possession Clause 11.2 of buyer's agreement: the possession of the unit was proposed to be delivered within 39 months from the date of execution of buyer's agreement or start of construction after the grant of Environmental Clearance by MOEF whichever is later with 6 months grace period.	08.06.2019
7.	Delay in handing over of possession till date	2 year 04 months

PAYMENT DETAILS		
8.	Total sale consideration	Rs 77,97,420 /-
9.	Amount paid by the complainants	Rs 56,79,936 /-
10.	Payment Plan	Performance linked payment plan

10. The respondent contested claim filed by complaint by filing a reply dated 15.02.2021. It is averred that complainant has opted for performance linked payment plan. On 28.12.2017 permission to mortgage was issued by respondent in favour of ICICI Bank. The complainant switched to HDFC Bank and a fresh permission to mortgage dated 08.07.2020 was issued by respondent to HDFC Bank, followed by a tripartite agreement dated 16.07.2020 executed among complainant, respondent and HDFC Ltd. He (complainant) failed to make payment as per payment plan opted by him and has made several defaults in the payment of instalments towards subject unit. As on date there is an interest of Rs 2,36,357/- upon complainant for delay in making instalment charges.

11. As per clause 11.2. of BBA, the possession of unit was to be delivered within 39 months from the date of agreement with grace period of 6 months subject to timely payment

by the allottee as well as force majeure circumstances. The construction work was stopped several times during the year 2016, 2017, 2018, 2019 and 2020 by the order of EPCA, HSPCB, NGT and Hon'ble Supreme Court. Due to increase in level of pollution, hon'ble Supreme Court vide its order dated 14.11.2019 in the matter of **M.C. Mehta v Union of India & others, writ petition (c) No. 13029/1985**, had imposed complete ban on construction and excavation work, which was uplifted completely on 14.02.2020.

12. The construction work is going on its full swing and major part of it, is already completed, despite the financial obstacles due to economic slowdown. Due to current pandemic covid-19 situation the construction at the site is slowed down. Moreover, on 30.09.2020 a team appointed by hon'ble authority duly inspected the project site and was satisfied with the construction activities. The money paid by allottees have been utilised for the construction of the project and it is not feasible to pay back the amount as sought by the complainant.

13. It is further contended that there is an arbitration clause (clause 28.2) in the agreement, complainants without invoking arbitration proceedings, have filed this complaint and same is liable to be dismissed.



14. It (respondent) had always kept complainant aware of the status of the project, and to avoid contractual obligation complainant has filed frivolous claim which is liable to be dismissed.
15. I have heard learned counsels for parties and have perused the record
16. It is admitted fact that occupation certificate for the said tower has not been obtained by the respondent. In compliance of the order dated 30.07.2021, respondent has filed an affidavit of Mr. Ramphal Yadav, authorised representative of respondent company wherein it has been mentioned that due to several court orders and other force majeure conditions the construction work was halted for 37 weeks. As per the table of status of construction and photographs filed by the respondent, the project is almost 85 % complete.
17. As per terms of buyer's agreement, possession of the unit was to be given within 39 months from the date of execution of agreement or start of construction after grant of environmental clearance by MOEF, whichever is later, with 6 months grace period. There is no evidence on record to show date of start of construction, thus due date for possession is calculated from date of agreement i.e. 08.03.2016, it comes out as 08.06.2019. Respondent did not file copies of orders passed by EPCA, HSPCP, NGT etc or any other evidence to verify that construction was remained actually stopped during 2016-2020 as claimed

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by it. As per the status report filed by the respondent, project is 85 % complete but no fixed date has been given by the respondent till when it will deliver the possession of the unit to the complainant.

18. As per clause 11.6 of the buyer's agreement, in case of delay of more than 12 months in completion of construction of unit as per scheduled given in the agreement, the allottee is entitled to withdraw from the project and claim refund of the amount paid by him with 9 % interest.
19. 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.
20. When buyer has made timely payment towards the allotted unit, same is well within his right to claim possession as per agreement. A buyer cannot be made to wait indefinitely, for his/her dream unit. It is not claimed on behalf of respondent that it has received the occupation certification for the tower in which the allotted unit is situated.
21. Considering facts stated above, complaint in hands is accordingly allowed and respondent is directed to refund


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amount received from the complainant i.e. Rs 56,79,936 to latter within 90 days from today, with interest @ 9.3 % p.a. from the date of each payment, till realisation of amount. A cost of litigation etc, Rs 50,000 is also imposed upon respondent to be paid to complainant.

File be consigned to registry.

25.10.2021

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

Judgement uploaded on 30.10.2021.