

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

Complaint no. : 5558 of 2019
First date of hearing: 19.12.2019
Date of decision : 20.07.2021

1. Sachin Jain
2. Nutan Jain
3. Shumi Jain

R/o: H.no.4284, Sector-23-A, Gurugram, Haryana

Complainants

Versus

Ambience Projects & Infrastructure Pvt. Ltd.
Regd. office: L-4, Green Park Extension, New Delhi

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Shri. Abhay Jain
Shri. Ravi Kumar

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 21.11.2019 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) and section 13 of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

2. 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.	Name and location of the project	"The Creacions", Sector- 22, Gurugram
2.	Nature of the project	Residential complex
3.	Project area	14.819 acres
4.	DTCP License	48 of 2012 dated 12.05.2012 Valid up to 11.05.2018
	Name of the licensee	Ambience Projects & Infrastructure Pvt. Ltd.
5.	HRERA registered/ not registered	Registered vide no. 318 of 2017 dated 17.10.2017 Valid till 31.12.2022
6.	Application form	03.01.2015 (As per page 28 of the complaint)
7.	Allotment letter	23.07.2015 (As per page 35 of the complaint)
8.	Date of execution of flat buyer's agreement	Not executed
9.	Unit no.	J-903, 9 th floor, Block J (As per page 35 of the complaint)
10.	Super Area	2781 sq. ft.
11.	Payment plan	Time linked payment plan (As per page 36 of the complaint)
12.	Total consideration	Rs. 2,88,49,050/- (As per page 36 of complaint)
13.	Total amount paid by the complainants	Rs. 2,34,85,545/-



		(As alleged by complainants on page 08 and accepted by respondent on page 08 of reply)
14.	Due date of delivery of possession <i>(As per email of the respondent-company dated 03.04.2017 on page 40 of complaint, sent to the complainants restrict the period of completion of the apartment within 5 years from the date of allotment instead of 5 years from date of execution of apartment buyer's agreement.)</i>	23.07.2020 (Since no BBA has been executed inter-se parties, due date of delivery of possession is calculated from date of allotment i.e.; 23.07.2015)
15.	Offer of possession	Not offered
16.	Occupation Certificate	Not obtained
17.	Delay in delivery of possession from due date of possession i.e.; till the date of order i.e.; 20.07.2021.	11 months 27 days

B. Facts of the complaint

3. That the grievances of the complainants relate to breach of contract, false promises, gross unfair trade practices and deficiencies in the services committed by the respondent in regard to apartment no.- J-903, 9th floor, block J, measuring 2781 square feet (hereinafter referred to as "Apartment") in the project called 'The Creacions' (hereinafter referred to as "Project") in Creacions Ambience Residential Apartment Complex, Sector 22, Gurugram, Haryana. The respondent, Ambience Projects and Infrastructure Private Limited (hereinafter referred to as Respondent/Developer/Seller/Builder/Promoter/Company) is a company

duly incorporated under the Companies Act, 1956 and is being sued through its chairman cum managing director.

4. That complainants, Mr Sachin Jain, Mrs Nutan Jain and their daughter Ms Shumi Jain booked an apartment in the Creacions Ambience residential apartment complex, Sector 22, Gurugram, Haryana by paying a sum of Rs.15,00,000/- as booking amount and thereby, the application form was filled. On 16.05.2015, the complainants paid amount of Rs.9,84,989/- to the respondent towards the booking.
5. That on 23.07.2015, the respondent issued a letter of provisional allotment of apartment no. J - 903, 9th floor, Block J in the project and till February 2016, the complainants made timely payments as and when demanded by the respondent and ultimately paid a total of Rs.2,34,85,545/ and made repeated requests to execute the apartment buyer's agreement.
6. That on 22.07.2016, the respondent sent the apartment buyer's agreement after a delay of more than one year and six months of booking and surreptitiously changed certain terms of the agreement which were contrary to agreed terms at the time of booking.
7. That the complainants have been making numerous requests to rectify the terms of the apartment buyer's agreement and rightfully execute the agreement. But the respondent failed to execute the agreement till date.

8. That the date of offer of possession stipulated from the payment plan provided at the time of booking and confirmed through the provisional allotment dated 23.07.2015 was 3rd January 2019.
9. That the respondent has collected a huge amount from gullible and naïve buyers including the complainants from 2015 to 2016 and kept on procrastinating the execution of the agreement. The respondent promised the complainants to deliver the possession of the apartment as per payment plan detailed in the application form i.e.; by 3rd January 2019. The respondent, firstly, has not yet executed the lawful, rightful and honest agreement even after more than four year and eleven months of booking and secondly, the respondent has failed to offer the possession of the apartment despite receipt of more than 80% cost of the apartment even after a delay of more than ten months. Moreover, the complainants are sceptical about the construction activities at the project site.
10. That the genesis of the present complaint lies in the gross indifference, refusal and failure of the various obligations on the part of the respondent. The respondent enticed various customers including the complainants to pay their hard-earned money in the purchase of a residential apartment in the project known as 'Creacions' at Sector 22, Gurugram, Haryana. The complainants have paid the payments, as and when demanded by the respondent, a sum of Rs.2,34,85,545/- till February, 2016 which is more than 80% of the total consideration on the promise and commitments that the offer of possession of the apartment would be delivered in time to the

complainants. The respondent has failed to execute a lawful, rightful and honest agreement even after lapse of more than four years and eleven months of booking. Further, even after a delay of more than ten months, the respondent has failed to offer possession of the apartment till the date of possession being 3rd January 2019.

C. Relief sought by the complainants:

11. The complainants have sought following reliefs:

- i. Direct the respondent to award a sum of Rs.1,98,649/- per month for delay of possession, at the prevailing rate as per RERA rules and further, to pay a sum of Rs.20,24,583/- towards the delay caused, which has been calculated from 3 January 2019 till 9th November, 2019.
- ii. Direct the respondent to rectify the defects/anomalies in the proposed apartment buyer's agreement and execute the lawful, right and honest agreement, based on the promises made at the time of booking in January 2015.
- iii. Direct the respondent to complete the construction and handover the possession of the apartment to the complainants immediately.
- iv. Direct the respondent to pay interest for every month of delay, since January 2019, in offering possession of the apartment to the complainants, on the amount taken from the complainants and additional charges for the aforesaid apartment, at the rate prescribed by the Act, 2016 till the respondent hand over the possession of the apartment.
- v. Direct the respondent to pay legal expenses of Rs.1,00,000/- incurred by the complainants.

12. On the date of hearing, the authority explained to the respondent/promoter about the contraventions as alleged to have been committed in relation to section 11(4)(a) and 13 of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

- i. That the instant complaint is liable to be dismissed as it is premature. The date of possession was to be captured in the apartment buyer's agreement which in this case was not executed by the complainants for the reasons best known to them, despite consistent and persistent follow up for the same. The apartment buyer's agreement was sent on 22.7.2016 which was to be returned to the respondent after its signing. But the complainants have been avoiding the execution of the same despite various reminders. The complainants have refused to sign the agreement on one pretext or the other, despite various reminders on several dates. Hence, the complainants cannot be allowed to take advantage of their own wrong to make allegation of delay in handing over possession to them.
- ii. That it is pointed out that the complainants in their various emails / letters have been claiming that they were assured the possession of the apartment within 60 months from the date of application dated 03.01.2015 i.e. 03.01.2020. A reference is drawn to complainants' mails dated 30.03.2017 and 22.07.2019 wherein specifically they have desired that the clause be captured in the apartment buyer's agreement that possession would be handed over within 60 months from date of application dated 03.01.2015. Without admitting the aforesaid claim of the complainants, it is submitted

that even as per the admitted stand of the complainants, the date of possession would become due on 03.01.2020 and thus, the present complaint is premature. However, it is submitted that no such assurance was ever given to the complainants either verbally or in writing.

- iii. That in the anxiety of lodging complaint to arm twists the respondent company, now he has taken a turn around to claim that the possession was liable to be given by January 2019, which is contrary to them own stand.
- iv. That, as per the terms and condition mentioned in the application form which has been filled by the complainants for provisional booking /allotment of the apartment in the respondent's project namely, 'Creacions', it has been specifically mentioned in para 3 that the application does not constitute an agreement to sell and applicants do not become entitled to the provisional or final allotment of the apartment, notwithstanding the fact that respondent may have issued a receipt of acknowledgement of the money tendered along with the application.
- v. That in addition to this, in para 5 of the application form, it is clearly mentioned that it is only after signing and execution of the apartment buyer's agreement on the company's standard format agreeing to abide by all the terms and conditions laid down therein, the allotment shall become final and binding on the respondent.
- vi. Further, in the provisional allotment letter issued in pursuance of the application form specifically states in para 2 that the allotment was subject to the complainant's execution of apartment buyer's agreement on the

company's (respondent) standard format and compliance to all the terms and conditions as contained in application form, apartment buyer's agreement and the payment plan. In this case, the complainants have not signed and executed the aforesaid agreement and hence, the entire claim of the complainants is based on hearsay submissions. That no assurance to handover possession was given for January 2019 or January 2020.

- vii. That payment plan and date of possession are two different things and not connected to each other. The payment plan was for four years and not for giving possession.
13. 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.

E. Jurisdiction of the authority

14. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E. I Territorial jurisdiction

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.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottees as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

The provision of assured returns is part of the builder buyer's agreement, as per clause 15 of the BBA dated..... Accordingly, the promoter is responsible for all obligations/responsibilities and functions including payment of assured returns as provided in Builder Buyer's Agreement.

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance of the obligations cast upon the promoters, the allottees and the real estate agents under this Act and the rules and regulations made thereunder.

So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter 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 complaint is to be dismissed on account of being pre-mature.

15. The respondent has contended that the complaint should be dismissed on account of being pre-mature. The complainants have booked the unit on 03.01.2015 by paying a sum of Rs.15,00,000/- as booking amount. The respondent has issued a provisional allotment letter on 23.07.2015 along

with payment plan. As per payment plan on page 36 of complaint, the construction was to be completed between 42 months of booking or completion of flooring work whichever is later i.e.; 03.07.2018. As per email of the respondent-company dated 03.04.2017 on page 40 of complaint, sent to the complainants restrict the period of completion of the apartment within 5 years from the date of allotment instead of 5 years from date of execution of apartment buyer's agreement. Since no buyer's agreement has been executed inter-se parties, the due date of possession is calculated from date of allotment, which comes out to be 23.07.2020. The complaint was filed on 21.11.2019 and is finally decided on 20.07.2021 where due date of possession was 23.07.2020 and till date of order there was no offer of possession by the respondent- company. Hence, there arises a cause of action and the complaint is not pre-mature.

G. Findings regarding relief sought by the complainants.

Relief sought by the complainants:

- i. Direct the respondent to pay legal expenses of Rs.1,00,000/- incurred by the complainants.

G.I Direct the respondent for payment of legal charges

16. The complainants are claiming compensation in the present relief. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement/rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

- ii. Direct the respondent to award a sum of Rs.1,98,649/- per month for delay of possession, at the prevailing rate as per RERA rules and further, to pay a sum of Rs.20,24,583/- towards the delay caused, which has been calculated from 3 January 2019 till 9th November, 2019.
- iii. Direct the respondent to rectify the defects/anomalies in the proposed apartment buyer's agreement and execute the lawful, right and honest Agreement, based on the promises made at the time of booking in January 2015.
- iv. Direct the respondent to complete the construction and handover the possession of the apartment to the complainants immediately.
- v. Direct the respondent to pay interest for every month of delay, since January 2019, in offering possession of the apartment to the complainants, on the amount taken from the complainants and additional charges for the aforesaid apartment, at the rate prescribed by the Act, 2016 till the respondents hand over the possession of the apartment.

G.II Admissibility of delay possession charges.

17. In the present complaint, the complainants intends to continue with the project and is 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

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

18. The complainants have booked the unit on 03.01.2015 by paying a sum of Rs.15,00,000/- as booking amount. The respondent has issued a provisional

allotment letter on 23.07.2015 along with payment plan. As per payment plan on page 36 of complaint, the construction was to be completed between 42 months of booking or completion of flooring work whichever is later i.e.; 03.07.2018. As per email of the respondent-company dated 03.04.2017 on page 40 of complaint, sent to the complainants restricted the period of completion of the apartment within 5 years from the date of allotment instead of 5 years from date of execution of apartment buyer's agreement. Since no buyer's agreement has been executed inter-se parties, due date of possession is calculated from date of allotment, which comes out to be 23.07.2020.

19. **Admissibility of delay possession charges at prescribed rate of interest:**

The complainants are seeking delay possession charges 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.

20. 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

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and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.

21. 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%.
22. The definition of term 'interest' as defined under section 2(za) 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:

"(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;"*

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.

23. 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 allotment letter dated 23.08.2015 and email dated 03.04.2017, due date of possession comes out to be 23.07.2020.

24. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities 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 respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 23.07.2020 till handing over of 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.

H. Directions of the authority:

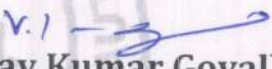
25. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the authority under section 34(f) of the act of 2016:
- i. The respondent shall pay interest at the 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. 23.07.2020 till handing over of the possession of the unit after obtaining occupation certificate.
 - ii. The arrears of such interest accrued so shall be paid by the promoter to the allottees within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoters to the allottees before 10th of the subsequent month as per rule 16(2) of the rules.

- iii. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.
 - iv. The rate of interest chargeable from the allottee by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
 - v. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.
26. Complaint stands disposed of.
27. File be consigned to registry.


(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram


(Vijay Kumar Goyal)

Member

Dated:20.07.2021

JUDGEMENT UPLOADED ON 14.12.2021

HARERA
GURUGRAM