

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

**Complaint no. : 2253 of 2018**  
**First date of hearing : 26.03.2019**  
**Date of decision : 26.03.2019**

1. Major General Bhaskar Kalita
2. Mrs. Babita Kalita  
R/o: House no. 90, Pratap Chowk, Delhi  
Cantt, New Delhi

**...Complainants**

**Versus**

M/s Selene Constructions Ltd.  
Office: F-60, Malhotra Building, 2<sup>nd</sup> floor,  
Connaught Place, New Delhi  
Also at: 448-451, Indiabulls House, Udyog  
Vihar Phase V, Gurugram

**...Respondent**

**CORAM:**

Shri Samir Kumar  
Shri Subhash Chander Kush

**Member**  
**Member**

**APPEARANCE:**

Shri Prashant Sheoran Advocate for the complainants  
Shri Rahul Yadav Advocate for respondent

**ORDER**

1. A complaint dated 21.12.2018 was filed under section 31 of the Real Estate (Regulation and Development) Act, 2016 read with rule 28 of the Haryana Real Estate (Regulation and Development) rules, 2017 by the complainants Major general Bhaskar Kalita and Mrs. Babita Kalita, against M/s Selene



Constructions Ltd., on account of violation of flat buyer's agreement executed on 10.07.2014 in respect of flat/unit described below in the project 'Indiabulls Centrum Park', for not handing over possession by the due date which is an obligation of the promoter under section 11(4)(a) of the Act *ibid*.

2. Since, the flat buyer's agreement has been executed on 10.07.2014 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, 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 the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
3. The particulars of the complaint case are as under: -

1.	Name and location of the project	"Indiabulls Centrum Park", Village Daulatabad, Sector 103, Gurugram, Haryana
2.	Project area	22.062 acres
3.	RERA Registered/ not registered.	<b>Registered</b>
4.	HRERA registration number	<b>11 of 2018 for phase I</b> <b>10 of 2018 for phase II</b>
5.	HRERA registration certificate valid upto	<b>31.07.2018 for phase I</b> <b>31.10.2018 for phase II</b>
6.	Flat/unit no.	L031, 3 <sup>rd</sup> floor, tower L
7.	Unit measuring	1481 sq. ft'
8.	OC granted on	23.07.2018
9.	Offer of possession	25.10.2018



10.	Flat buyer's agreement executed on	10.07.2014
11.	Total sale consideration as per intimation of instalment dated 25.10.2018	Rs. 92,36,982 (page 53)
12.	Payment plan	Possession linked plan (25:75)
13.	Due date of delivery of possession as per clause 21 of the said agreement ( 3 years from the date of execution of the agreement + 6 months grace period)	10.01.2018
14.	Delay in handing over possession till offer of possession	9 months 15 days
15.	Penalty clause as per buyer's agreement	Clause 22 of the agreement i.e. Rs.5 per sq. ft' of the super area per month for the period of delay

4. The details provided above have been checked on the basis of record available in the case file which has been provided by the complainants and the respondent. A flat buyer's agreement dated 10.07.2014 is available on record for the aforesaid unit according to which the possession of the said unit was to be delivered by 10.01.2018 and the possession was offered to the complainants on 25.10.2018. However, the respondent has not paid any interest for the period the possession is delayed. Therefore, the promoter has not fulfilled his committed liability as on date.
5. Taking cognizance of the complaint, the authority issued notice to the respondent for filing reply and for appearance.



the case came up for hearing on 26.03.2019. the respondent through its counsel appeared on 26.03.2019. The reply filed on behalf of the respondent on 23.01.2019 has been perused.

### **Facts of the complaint**

6. The complainants submitted that they were interested in availing residential flat in Gurugram city. The search for such a residential flat on the part of complainants led them to the respondent, who was in the process of developing a group housing colony in the name of 'Indiabulls Centrum Park' situated in Sector-103, Gurugram.
7. Prior to entering into a written agreement for residential unit in the aforementioned project, the complainants duly apprised the respondent that they wanted and needed the possession of fully developed residential unit within time bound manner. Considering the nature of demand on the part of the complainants, the respondent specifically represented that the possession of fully built and complete residential apartment shall be delivered by the respondent to the complainants within a maximum period of 3 years and a grace period of 6 months. Relying upon the representations made by the respondents and assurances so given the complainants booked a unit no. L031 in the aforementioned



project and in lieu of the same, they made payments as detailed in Annexure 1, 3, 5, 6. And after making initial 25% payment as per booking, respondent issued a provisional allotment letter dated 25.06.2014 and a unit bearing no. L031 was allotted to the complainants. In furtherance to provisional allotment letter i.e. Annexure 7 parties entered into a flat buyer's agreement on 10.07.2014, wherein a unit bearing no. L031 situated at 3<sup>rd</sup> floor in tower/block-L having approximate super area of 1481 sq. ft. and covered area of 1135 sq. ft. was allotted to the complainants.

8. At the time of booking, the amount of Rs.1,00,000/- was paid by the complainants to the respondent. The basic sale price of the unit is Rs.76,55,000/- calculated @ Rs.5168.80 per sq. ft.
9. In terms of clause no.21 of the flat buyer's agreement, it had been agreed that the developer shall complete the construction on the said residential unit within a period of 3 months with a 6 months grace period thereof from the date of execution of the flat buyer agreement.
10. The complainants were counting upon the respondent to abide by the terms of the flat buyer agreement as well as the assurances which had been given to the complainants at the time of booking the unit in question to the effect that the



possession of the said unit shall be delivered within a period of 3.5 years.

11. The aforementioned period of 3.5 years expired in December 2017. Till December 2017 admittedly the respondent had not completed the said unit. On account of failure on the part of the respondent to complete the said project within the agreed time period, the complainants duly conveyed to the respondent that since the respondent has failed to deliver the unit within agreed time period, therefore, the complainants do not require the said unit and that the amounts which had been paid by the complainants to the respondent be refunded back to them. An email in this regard was also sent by the complainants to the respondent but the said request was not accepted by the respondent.
12. The following amounts have been paid by the complainants to the respondent towards the said unit:

Rs.1,00,000/- paid at the time of booking on 17.04.2014 against receipt no. 11087.

Rs.9,00,000/- paid on 16.06.2014 against receipt no. 11317.

Rs.3,53,730/- paid on 16.06.2014 against receipt no. 11318.

Rs.7,35,833/- paid on 16.05.2014 against receipt no.11142.





13. The complainant no.1 as of now is posted Likabali (Assam-Arunachal Border), and he is serving in Indian Army as Major General. On account of nature of the service of the complainant no.1, he could not follow-up the matter with the respondent personally. However, the respondent had never denied its liability to refund the entire amount which have been received from the complainant.

14. Recently the complainants were in receipt of another instalment intimation, illegally asking for balance amount. Thereafter complainants again contacted respondent and respondent asked to contact some Mayank Singal in this regard as he will help them in refund process. The complainants also sent a mail, in this regard to respondent. The respondent in reply to said mail instead of refunding the amount, sent an e-mail wherein it was alleged that the amounts paid by the complainants will not be refunded on account of alleged deductions as per the alleged policy and the agreement. The deductions alleged to be 15% of the total price, service tax, VAT, GST, brokerage, interest.

15. The complainant submitted that the respondent not only committed breach of agreement but also violated rules of RERA. Even as per RERA complainants have right to seek



refund if the developer fails to offer possession on time and the complainants have already availed that remedy.

#### 16. Issues raised by the complainants

- I. Whether the respondent company has committed breach of the terms of the flat buyer's agreement dated 10.07.2014?
- II. Whether the respondent company is liable to refund the entire amount along with rate of interest as per the Act *ibid*?
- III. Whether the respondent company has committed violation of provisions of the said Act?

#### 17. Relief sought

The complainants are seeking the following reliefs:

- I. Pass a direction to respondent company to refund the entire amount along with interest as prescribed under the Act *ibid*.
- II. Any other relief(s) or direction(s) which this hon'ble authority may deem fit and proper in the facts and circumstances of the present case.





### Reply on behalf of respondent

18. The respondent submitted that the instant complaint filed by the complainants is not maintainable, on facts or in law, and is as such liable to be dismissed/ rejected being filed in the provisions of the RERA Act, 2016 and RERA rules 2017 which are outside the preview of this hon'ble authority.
19. The respondent submitted that the allegations made in the instant complaint are wrong, incorrect and baseless in the fact and law. The respondent denies them in toto. Nothing stated in the said complaint shall be deemed to be admitted by the respondent merely on account of non-transverse, unless the same is specifically admitted herein. The instant complaint is devoid of any merits and has been preferred with the sole motive to extract monies from the respondent, hence the same is liable to be dismissed.
20. The respondent submitted that instant complaint filed by the complainants is outside the preview of this hon'ble authority as the complainants themselves approached the respondent and showed interest to book unit in the project to be developed by the respondent. Thereafter the complainants post understanding the terms and conditions of the agreement(s) had voluntarily executed flat buyer agreement



with the respondent on 10.07.2014. It is submitted that as per the agreement duly executed between the complainants and the respondent, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the provisional unit booked by the complainants, the same shall be adjudicated through arbitration mechanism as detailed in the agreement. The respondent craves leave of this hon'ble authority to refer and rely upon the clause no. 49 which is being reproduced hereunder for ready reference:

*“Clause 49 - All or any dispute arising out or touching upon or in relation to the terms of this Application and/or Flat Buyers agreement including the interpretation and validity of the terms thereof and the rights and obligations of the parties shall be settled amicably by mutual discussion failing which the same shall be settled through Arbitration. The arbitration shall be governed by Arbitration and Conciliation Act, 1996 or any statutory amendments/modifications thereof for the time being in force. The venue of the arbitration shall be New Delhi / Gurgaon and it shall be held by a sole arbitrator who shall be appointed by the Developer and whose decision shall be final and binding upon the parties. The Buyer hereby confirms that he/she shall have no objection to this appointment even if the person so appointed as the Arbitrator, is an employee or advocate of the Developer or is otherwise connected to the Developer and the Buyer confirms that notwithstanding such relationship / connection, the Applicant(s) shall have no doubts as to the independence or impartiality of the said*



*Arbitrator. The courts in New Delhi alone shall have the jurisdiction.”*

21. Thus, in view of above clause 49 of the buyer’s agreement, it is humbly submitted that, the dispute, if any, between the parties are firstly arising out of the said duly executed flat buyer’s agreement and it was specifically agreed to refer the dispute, if any, qua the agreement to arbitration. Thus, the complainants are contractually and statutorily barred from invoking the jurisdiction of this hon’ble authority. Moreover no cause of action ever arose in favor of the complainants and against the respondent. Further the hon’ble authority has no jurisdiction to entertain the present complaint and decide the same. Hence, the present complaint filed by the complainants is liable to be dismissed on the very same ground.

22. It is respectfully submitted that the relationship between the complainants and the respondent is governed by the document executed between them i.e. flat buyer’s agreement dated 10.07.2014. It is pertinent to mention herein that the instant complaint of the complainants are further falsifying their claim from the very fact that the complainants have filed the instant claim for refund and not for possession of the flat provisionally booked by them. It is stated that the complainants have not come before this hon’ble authority



with clean hands and wishes to take advantage of their own misdoings with the help of the provisions of the RERA, which have been propagated for the benefit of innocent customers who are end-users and not defaulters, like the complainants in the present complaint.

23. The respondent submitted that from the very beginning it was in the knowledge of the complainants, that there is a mechanism detailed in the buyer's agreement which covers the exigencies of inordinate delay caused in completion and handing over of the booked unit i.e. enumerated in the "clause 22" of duly executed buyer's agreement. The respondent carves leave of this hon'ble authority to refer and rely upon the clause 22 of buyer's agreement which is being reproduced hereunder for ready reference:

*"Clause 22: In the eventuality of Developer failing to offer the possession of the unit to the Buyers within the time as stipulated herein, except for the delay attributable to the Buyer/force majeure / vis-majeure conditions, the Developer shall pay to the Buyer penalty of Rs. 5/- (Rupees Five only) per square feet (of super area) per month for the period of delay ....."*

24. It is thus prayed, that the complainants being aware, having knowledge and having given consent to the incorporation of the above mentioned clause, are now evading from the truth of its existence and does not seem to be satisfied with the



amount offered in lieu of delay. It is thus obvious that the complainants are rescinding from the duly executed contract between the parties.

25. The respondent submitted that it is only after being satisfied with the project in totality that the complainants expressed their willingness to book a unit in the project looking into the financial viability of the project and its future monetary benefits got the said unit booked with the respondent.

26. The respondent has already completed the construction of "tower L " and has also already offered possession of the unit of the complainants vide letter dated 25.10.2018. The delay in delivering the possession of the flat to the complainants was beyond the control of the respondent, since for completing a project number of permissions and sanctions are to be required from numerous government authorities which were delayed with no fault of the respondent. In addition to the problems related to labour/ raw material and government restrictions including National Green Tribunal which imposed a ban on carrying out constructions in Delhi-NCR for several months, the respondent kept on the work moving steadily. Based upon the past experiences the respondent has specifically mentioned all the above contingencies in the flat buyer's agreement dated 10.07.2014



and incorporated them in “clause 39” of FBA at page 42 annexed with the complaint by the complainant.

27. In addition to the reasons as detailed above, there was a delay in sanctioning of the permissions and sanctions from the departments. In fact as of now no proper connectivity has been provided to the project of the respondent by the Haryana Government. It will also not be out of place to mention that the respondent has been diligently pursuing the matter with various authorities and hence no delay can be attributed on the part of the respondent.

28. The respondent submitted that the agreement that has been referred to, for the purpose of getting the adjudication of the instant complaint i.e. the flat buyer agreement dated 10.07.2014 executed much prior to coming into force of the RERA Act, 2016 and the HA-RERA Rules, 2017. Hence, cannot be relied upon till such time the new agreement to sell is executed between the parties. Thus, in view of the submissions made above, no relief can be granted to the complainants on the basis of the new agreement to sell as per RERA, Act 2016.

29. The respondent has made huge investments in obtaining requisite approvals and carrying on the construction and





development of 'INDIABULLS CENTRUM PARK' project not limiting to the expenses made on the advertising and marketing of the said project. Such development is being carried on by developer by investing all the monies that it has received from the buyers / customers and through loans that it has raised from financial institutions. In spite of the fact that the real estate market has gone down badly, the respondent has managed to carry on the work with certain delays caused due to various above mentioned reasons and the fact that on an average more than 50% of the buyers of the project have defaulted in making timely payments towards their outstanding dues, resulting into inordinate delay in the construction activities. Still the construction of the project 'INDIABULLS CENTRUM PARK' has never been stopped or abandoned and has now reached its pinnacle in comparison to other real estate developers / promoters who have started the project around similar time period and have abandoned the project due to such reasons.



30. It is a respectful submission of the respondent that the complainants have miserably failed to make a case against the respondent. It is submitted that the complainant has merely alleged in their complaint about delay on part of the respondent in handing over of possession but have failed to

substantiate the same. The fact is that the respondent, has been acting in consonance with the duly executed flat buyer's agreement dated and no contravention in terms of the same can be projected on the respondent.

31. The complainants have made false and baseless allegations with a mischievous intention to retract from the agreed terms and conditions duly agreed in buyer's agreement entered into between the parties. In view of the same, it is submitted that there is no cause of action in favour of the complainants to institute the present complaint.

32. The complainants have filed the present compliant for the refund of amount paid by the complainants to the respondent. That as per the RERA Act, this hon'ble authority has no jurisdiction to pass an order of refund and the compliant is liable to be dismissed on this very ground. The complainants ought to have filed their compliant before the adjudicating officer and not before this hon'ble authority.

### **Determination of issues**

After considering the facts submitted by the complainants, reply by the respondent and perusal of record on file, the issue wise findings of the authority are as under:



33. With respect to the **first, second and third issue**, the authority came across clause 21 of flat buyer's agreement dated 10.07.2014 and the clause regarding the possession of the said unit is reproduced below:

*"21 Possession*

*The company has to hand over possession of the said apartment to the allottee within a period of 36 months from the date of execution of this agreement plus 6 months grace period."*

Accordingly, the due date of possession was 10.01.2018 and the possession was offered to the complainants on 25.10.2018. therefore, the possession has been delayed by 9 months 15 days till the date of offer of possession, thereby committing breach of the said agreement.

Therefore, the promoter has failed to fulfil its obligation under section 11 of the Act *ibid*. As the respondent has already obtained OC from the concerned authority and thereafter, the respondent has offered possession on 25.10.2018, the prayer of refund cannot be allowed.

**Findings of the authority**

34. The application filed by the respondent for rejection of complaint raising preliminary objection regarding jurisdiction of the authority stands dismissed. The authority has complete jurisdiction to decide the complaint in regard to



non-compliance of obligations by the promoter as held in ***Simmi Sikka V/s M/s EMAAR MGF Land Ltd.*** leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

35. For the issue of arbitration clause raised by the respondent, the amendment of section 8 of the Arbitration and Conciliation Act does not have the effect of nullifying the ratio of catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause.

36. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015***, it was held that the arbitration clause in agreements between the complainants and builders could not circumscribe jurisdiction of a consumer.



37. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter under section 11 of the Act *ibid*. The complainants requested that necessary directions be issued by the authority under section 37 of the Act *ibid* to the promoter to comply with the provisions and fulfil obligation.

38. As per clause 21 of the flat buyer's agreement dated 10.7.2014 for unit no. L031, in project "Centrum Park" Sector-103, Gurugram, possession was to be handed over to the complainant within a period of 3 years from the date of execution of flat buyer's agreement + 6 months grace period which comes out to be 10.1.2018. However, the respondent has not delivered the unit in time. Complainants have already paid Rs.21,00,940/- to the respondent against a total sale consideration of Rs.92,36,982/- (including taxes). As such, complainants are entitled for delayed possession charges at prescribed rate of interest i.e. 10.75% per annum w.e.f 10.1.2018 as per the provisions of section 18 (1) of the Real Estate (Regulation & Development) Act, 2016 till offer of possession.

39. However, the complainants want to wriggle out from the project and is insisting to get their money back. Keeping in view the status of the project and receipt of occupation



certificate by the respondent and offer of possession already given to the complainant, the authority is not inclined to allow refund of amount. However, if the complainants want to withdraw from the project they have to forgo 10% of the total sale consideration without interest. In addition to this, complainant is also liable to pay service tax and other taxes deposited with the government by the respondent.

### **Decision and directions of the authority**

40. After taking into consideration all the material facts as adduced and produced by both the parties, the authority exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issues the following directions to the respondent in the interest of justice and fair play:

- (i) The respondent is directed to refund the amount deposited by the complainants by deducting 10% of total sale consideration.
- (ii) In addition to this, respondent is at liberty to charge service tax and other taxes received from the complainants and deposited with the concerned authorities.





(iii) Order should be complied within 90 days of issuance.

41. The complaint stands disposed of.

42. File be consigned to the registry.

**(Samir Kumar)**  
Member

**(Subhash Chander Kush)**  
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.03.2019

Judgement uploaded on 12.04.2019



HARERA  
GURUGRAM

