

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

Complaint No. : 1019 of 2018
Date of First Hearing : 12.02.2019
Date of Decision : 15.03.2019

Mr. Mayank Kumar Rastogi
Mrs. Shweta Rastogi
R/o H. No. B-114, Oakwood Estate, DLF Phase-
II, Gurugram, Haryana-122002

Complainants

Versus

M/s Pioneer Urban Land & Infrastructure Ltd.
Registered Office: A-22, 3rd floor, Green Park,
Aurobindo Marg, New Delhi-110016

Respondent

CORAM:

Shri Samir Kumar
Shri Subhash Chander Kush

Member
Member

APPEARANCE:

Mr. Kapil Madan and Ms. Shalini Sinha
Advocate for the complainants
Mr. Ishaan Dang
Advocate for the respondent

ORDER

1. A complaint dated 17.09.2018 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 Mr. Mayank



Kumar Rastogi and Mrs. Shweta Rastogi, against the promoter M/s Pioneer Urban Land & Infrastructure Ltd respect of apartment/unit described below in the project 'Araya', on account of violation of the obligations of promoter under section 11(4)(a) of the Act *ibid*.

- Since, the apartment buyer's agreement has been executed on 25.06.2012 i.e. prior to the commencement of the Real Estate (Regulation and Development) Act, 2016, therefore, the penal proceedings cannot initiated retrospectively. Hence, the authority has decided to treat the present complaint as an application for non-compliance of contractual obligation on the part of the promoter/respondent in terms of section 34(f) of the Real Estate (Regulation and Development) Act, 2016.
- The particulars of the complaint are as under: -

1.	Name and location of the project	"Araya", Sector-62, Gurugram
2.	Apartment no.	A-1601, 16 th floor, tower A
3.	Registered/ un registered	Registered
4.	RERA Registration no.	101 of 2017 dated 24.08.2017
5.	Revised date of delivery	31.12.2019
6.	Project area	24.606 acres



7.	Nature of real estate project	Groups Housing
8.	Total area of the allotted unit no.	5514 sq.ft.
9.	DTCP License no.	268 of 2007 dated 03.12.2007
10.	Payment Plan	Construction linked payment plan
11.	Date of apartment buyer agreement	25.06.2012
12.	Total consideration amount	Rs. 5,58,47,017 /- As per the agreement
13.	Total amount paid by the complainants	Rs. 5,21,35,076.66 /- As per annexure P-6
14.	Date of delivery of possession from the date of execution of apartment buyer agreement Clause-11.2- 39 months from the date of excavation including a grace period of 180 days	25.03.2016 Note: Due date of possession calculated from the execution of the agreement since the payment schedule does not have the date of excavation
15.	Intimation of Possession	28.08.2018 Annexure P-7
16.	Occupation Certificate Received on	23.07.2018 Annexure R-38



17.	Delay for number of months/ years till 28.08.2018	2 years 5 months 3 days
18.	Penalty clause as per apartment buyer agreement dated 25.06.2012	Clause 11.5(i)- Rs. 10/- per sq.ft of the super area of the said apartment per month till handing over possession.

4. The details provided above have been checked on the basis of the record available in the case file which have been provided by the complainants and the respondent. An apartment buyer agreement dated 25.06.2012 is available on record for the aforementioned apartment. The intimation of possession was made by the respondent on 28.08.2018.
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 12.02.2019 and on 15.03.2019. The respondent filed the reply and the same has been perused. The complainants has filed written arguments wherein he has re asserted the facts of the complaint and denied the assertions made by the respondent in his reply



Facts of the complaint

6. Briefly stating the facts of the complaint, the complainants desired to purchase an apartment in the project being

developed by the respondent. In this effect, the respondent assured to the complainants that it has taken all the necessary permissions and approvals for the project from the competent authorities and will deliver possession in the project within a period of thirty-nine months.

7. The complainants submitted that the respondent subsequently allotted to the complainants a unit in the project, numbered A-1601 in tower A, admeasuring 5,514 sq.ft., vide allotment letter dated 18.04.2012. An amount of Rs. 40,00,000/- was paid by the complainants towards booking.
8. The complainants subsequently entered into an apartment buyer's agreement dated 25.06.2012 with the respondent, wherein the respondent made material alterations to the terms agreed upon in the application form at the time of booking
9. The complainants submitted that the respondent unilaterally added a clause in the agreement i.e 11.2, wherein it was entitled to a grace period of one hundred and eighty days over and above the 39 months as originally promised, vide clause 11.2 of the agreement.



10. The complainants submitted that a bare reading of clause 11.2 of the agreement points to the mala fide of the respondent in never originally intending to hold good to the representations and promises made by it to the complainants at the time of booking with regards to the delivery of possession of the apartment. The aforementioned clause is so arbitrarily and vaguely drafted that a strict reading of the same would lead to a conclusion wherein the respondent seeks to accept absolutely no responsibility, liability, or obligation whatsoever with regards to providing a timely delivery of the project. It is submitted that the said clause is void for uncertainty as per section 29 of the Contract Act.

11. The complainants further submitted that clause 11.5 of the agreement, wherein the respondent has fixed a meagrely compensation to be paid by it in the event of delayed possession when in fact the respondent has been charging enormous interest at the rate of 18% per annum on the delayed payments.

12. The complainants submitted that in light of the 18% p.a. interest rate charged by the respondent on the complainants for any delay in payment on their part, the compensation to be paid by the respondent amounts to a substantial



unconscionability and renders clause 11.5 of the agreement unenforceable.

13. The complainants submitted that, despite the issues as explained above, they continued to make all the payments as demanded and prescribed by the respondent, honouring the promises made by them, and hoping that the respondent will hold good on its promises as well, especially with regards to timely possession of the apartment.

14. It is submitted that the respondent has abjectly failed to deliver the possession as promised with 39 months and the complainants have suffered huge losses since there is a sharp downward revision in the market price of the said flat.

15. The complainants submitted that the respondent is liable to pay to them an interest amount totalling to Rs. 2,71,35,594/- on account of the delay caused by the respondent in delivering the possession of the apartment.

16. The complainants submitted that the respondent issued an intimation for possession to the complainants on 28.08.2018, thirty-seven months after the originally promised date of possession, and called upon a payment of Rs. 1,13,74,364/-, due by 18.09.2018, under various heads from them.



17. It is submitted that the demands made under the heads 'advance common area charges', HVAT, electricity substation charges and club are misconceived and are untenable in law. The complainants accordingly wrote an email dated 06.09.2018 objecting the demand raised by the respondent and claimed the interest for the delay caused in the completion of project.

18. It is further submitted that the complainants also verily believe that there is no water, sewage or the electricity connection and consequently the offer of possession is still premature and is bad in law. Further, the complainants are also aggrieved by non-payment of GST input tax credit by the respondent.

19. Issues raised by the complainants

- I. Whether the respondent has committed a default by failing to deliver the apartment within 39 months as promised in the application form dated 16.04.2012?
- II. Whether the complainants are entitled to get interest for delay totalling to Rs. 27,135,594/- at the rate of 18% pa i.e. at the same rate at which the respondent has charged the interest?



- III. Whether the respondent can refuse to give GST input tax credit to the complainants?

20. Relief sought

- I. Direct the respondent to hand over possession of the apartment and execute the title documents with immediate effect.
- II. Direct the respondent to pay to the complainants a sum of Rs. 1,55,87,560/- towards the interest accrued from the 'originally promised date of possession' till the 'actual delivered date of possession' calculated at 18% p.a. on the payments made by the complainants to the respondent (after adjusting the amount payable by the complainants).

Respondent's reply

21. The respondent submitted that the relief sought by the complainants are devoid of merit and have been filed as an afterthought solely to harass and vex the respondent and therefore, the same are liable to be dismissed with costs.

22. The respondent submitted that the project is registered with the authority and the respondent denies each and every averment, statement, allegation, contention raised by the



complainants, unless the same has been specifically admitted hereinafter.

23. The respondent submitted that the complainants have not come to the hon'ble authority with clean hands and have concealed material facts. The complainants have failed to inform the authority that the ICICI Bank Ltd. has lien over the subjected property and the present complaint cannot be continued behind the back of ICICI Bank Ltd as they are necessary and proper party for adjudication of the case.

24. The respondent submitted that the present complaint is not maintainable before the authority. The complainants have filed the present complaint seeking interest for alleged delay in delivering possession of the apartment booked by the complainants. The complaints pertaining to interest, compensation etc, are to be decided by the adjudicating officer under section 71 of the Real Estate (Regulation and Development) Act, 2016 read with Rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 and not by this hon'ble authority.

25. The respondent submitted that complainants have no locus standi or cause of action to file the present complaint. The present complaint is based on an erroneous interpretation of



the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyer's agreement dated 25.06.2012.

26. The respondent submitted that the complainants were offered possession of the above mentioned unit through letter of "Intimation For Possession" dated 28.08. The complainants were called upon to remit balance payment including maintenance charges, interest charges, stamp duty etc as per the enclosed statements with the aforesaid letter. The complainants were requested to complete the necessary formalities/documentation necessary for handover of the apartment to them. However, the complainants ignored the legitimate and valid requests of the respondent to remit balance payment and complete necessary formalities for handover of the apartment in question and proceeded, instead, to file the instant frivolous and misconceived complaint.

27. The respondent further submitted that right from the beginning, the complainants were extremely irregular as far as payment of instalments was concerned. The respondent even though under no obligation to grant time or to allow the unjustified and inexcusable demands of the complainants but as a gesture of goodwill kept the transaction subsisting and



chose not to cancel the allotment endorsed in favour of the complainants.

28. The respondent submitted that due to the persistent defaults of the complainants the respondent was compelled to issue demand notices, reminders etc., calling upon the complainants to make payment of outstanding amounts payable by the complainants under the payment plan opted by the complainants. for making payment.

29. It is submitted that the complainants consciously and maliciously chose to ignore the demand letters and reminders issued by the respondent and flouted in making timely payments of the instalments which was an essential, crucial and an indispensable requirement under the buyer's agreement. Furthermore, when the proposed allottees default in their payments as per schedule agreed upon, the failure has a cascading effect on the operations and the cost for proper execution of the project increases exponentially while inflicts immense business loss to the respondent. The complainants chose to ignore all these aspects and wilfully defaulted in making timely payments.

30. The respondent submitted that the complainants, had delayed payment of instalments and consequently they are not eligible



to receive any compensation or interest from the respondent. The complainants have completely misconstrued, misinterpreted and miscalculated the time period as determined in the buyer's agreement. Since, the complainants have defaulted in timely remittance of payments as per schedule of payment the date of delivery of possession is not liable to be determined in the manner alleged by the complainants. It is pertinent to mention that clause 11.6 of the buyer's agreement categorically records that under no circumstances possession of the apartment would be delivered to the concerned allottee and the concerned allottee shall not be entitled to the possession of the apartment unless and until full payment of the sale consideration and any other dues payable under the agreement have been remitted to the respondent.

31. It is submitted that the alleged compensation sought by the complainants was to be construed for the alleged delay in delivery of possession. It is pertinent to note that an offer for possession marks termination of the period of delay, if any. The complainants are not entitled to contend that the alleged period of delay continued even after receipt of offer for possession and have consciously refrained from obtaining possession of the unit in question. Consequently, the



complainants are liable for the consequences including holding charges, as enumerated in the buyer's agreement, for not obtaining possession.

32. The respondent submitted that the construction of the project/allotted unit in question stands completed and the respondent is in receipt of the occupation certificate in respect of the same. It is submitted that as soon as the balance payment is remitted by the complainants and the necessary formalities are completed by them, the respondent will hand over possession of the apartment to the complainants.

33. The respondent submitted that this hon'ble authority does not have jurisdiction to adjudicate upon the legality and correctness of the contents and due execution of the buyer's agreement.

34. The respondent submitted that the respondent, as a gesture of goodwill, had credited an amount of Rs. 15,94,540/- to the account of the complainants. The respondent had further waived off an interest amount of Rs. 13,67,729/- that was due and payable by the complainants. As per the provisions of clause 23 of the buyer's agreement the respondent was empowered to cancel the allotment for non-payment, however



the respondent has not cancelled as it did not wish to cause any controversy.

35. The respondent submitted that the complainants are speculative investors. The relief of interest at the rate of 18% per annum or any other amount for the alleged delay sought by the complainants is wholly misconceived, grossly unfair and inherently unjust in the facts and circumstances of the case.

36. The respondent submitted that in the present case the respondent has made a declaration in terms of section 4(2)(L)(c) that it would complete the project by 30.12.2019. It is submitted that Araya Project at Sector -62, Gurgaon is covered under the definition of "on going project" and duly registered with this hon'ble authority and till the time the respondent has not faltered in its declaration in completion of the project it will be prejudicial to the legal rights of the respondent to be prosecuted under this Act.



37. The respondent submitted that that as per applicable Act and rules a complaint may be filed by a person only if the respondent has committed any act in violation of the Act. The complainants have miserably failed to bring on record any document, evidence etc. which may even allude let alone prove

that the respondent has violated the provisions of the Act and therefore complainants have no locus standi. The payment plan in terms of the agreement is a construction linked plan whereby the developer/builder raises demand when the construction reaches a particular stage and the allottee undertakes to make payment of the instalments on the basis of the said payment plan incorporated in the buyer's agreement.

38. The respondent submitted that quite recently, in compliance with the orders of Hon'ble National Green Tribunal, the Haryana State Pollution Control Board ordered on 9th November 2016 certain guidelines to be complied by all real estate developers that all construction activity needs to be immediately stopped. The respondent had to literally close its operations because of which the labour etc. went to their respective villages/towns etc.

39. The respondent submitted that the respondent duly paid the external development charges as per the license granted in its favour. The state government was supposed to lay the whole infrastructure in that licensed area for providing the basic amenities such as drinking water, sewerage, drainage including storm water line, roads etc. However, even on repeated requests the department paid no heed and ignored to



provide such basic amenities in these upcoming new sectors of Gurgaon.

40. The respondent submitted that in a completely unforeseeable ruling by the Hon'ble Supreme Court of India dated 08.05.2009, the Hon'ble Apex Court suspended all the mining Operations in the Aravalli Hill range falling in state of Haryana within the area of 448 sq. kms. approx. in the district of Faridabad and Gurgaon including Mewat. This ban by the Hon'ble Apex Court led to a situation of scarcity of the sand and other materials which were derived from the stone crushing activities, which directly affected the construction schedules and activities of the respondent.

41. The respondent submitted that such acute shortage of labour, water and other raw materials or the additional permits, licenses, sanctions by different departments, severely affected the real estate and these reasons were not in control of the respondent and were not at all foreseeable at the time of launching of the project and commencement of construction of the complex.

42. The respondent submitted that the terms of a contract are binding upon the party executing the contract and the same should be duly abided by and followed by the parties. It is a



settled law that in case of any breach of any terms of the contract or any lapses committed by any of the party to the contract, the terms of the contract to the extent of providing damages in case of such breach or lapses are binding upon the parties and the same have to be duly complied with. The Hon'ble Apex Court vide various judgments has been pleased to uphold the view that the terms of the contract are binding upon the parties. Thus, in view of the settled law the complainants herein are barred from claiming any exaggerated amount over and above what has been agreed by them in the buyer's agreement signed and executed by them with the respondent. The complainants are thus not liable to any interest at the rate of 18% per annum or at any other rate on the amounts so deposited by the complainants. It is a well settled principle of law that in case of immovable properties the loss has to be actual loss suffered, which has been neither pleaded nor proved by the complainants in the present complaint. It is a settled position of law that once the contract has been executed by a party, the terms become binding on the party. Further, the duty of the hon'ble authority is only to interpret the document as executed between the parties without altering the nature of the contract. The complainants are conscious of the fact that they are not entitled to any



interest in accordance of the terms and the conditions of the buyer's agreement. The present complaint as preferred by the complainants is nothing but an abuse of process of law.

43. The respondent submitted that the Ministry of Law and Justice vide notification (extraordinary), dated 23/10/2015 had notified the Arbitration and Conciliation (Amendment) Ordinance, 2015, as promulgated by the President of India by exercising his powers conferred by clause (1) of Article 123 of the Constitution to come into force at once. The aforesaid notification, section 8 of The Arbitration & Conciliation Act, 1996 has been amended and it has been provided, inter alia, that notwithstanding any judgment or decree of the Hon'ble Supreme Court or any court the judicial authority has to refer the parties to arbitration. In view of the arbitration clause in the buyer's agreement, this hon'ble authority has no jurisdiction to entertain, try or proceed with the present complaint in terms of section 8 read with section 5 of the Arbitration & Conciliation Act, 1996.



44. The respondent submitted that complaint is not supported by any proper affidavit with a proper verification and the complaint is liable to be rejected on this ground alone.

Determination of issues

After considering the facts submitted by the complainant, reply by the respondent and perusal of record on file, the authority decides seriatim the issues raised by the parties as under:

45. In regard to the **first issue** raised by the complainant, the promoters have violated the agreement dated 05.06.2012 for not giving the possession on the due date i.e 04.03.2016 as per the agreement, thus, the authority is of the view that the promoter has failed to fulfil his obligation under section 11(4)(a) of the Haryana Real Estate (Regulation and Development) Act, 2016. However, it is pertinent to mention here that intimation of possession was made on 28.08.2018.

46. With respect to the **second issue** raised, as the promoter has failed to fulfil his obligation under section 11, the promoter is liable under section 18(1) proviso to pay to the complainants interest, at the prescribed rate i.e 10.75% p.a w.e.f 25.03.2016 till the offer of possession i.e 28.08.2018.



47. The **third issue** raised by the complainants, the authority is not the appropriate forum to adjudicate this issue. Thus, the complainants are at liberty to approach the appropriate forum in this regard.

48. The complainants made a submission before the authority under section 34 (f) to ensure compliance/obligations cast upon the promoter as mentioned above.

49. The complainants requested that necessary directions be issued to the promoter to comply with the provisions and fulfil obligation under section 37 of the Act.

50. The complainants reserve their right to seek compensation from the promoter for which they shall make separate application to the adjudicating officer, if required

Findings of the authority

51. The respondent admitted the fact that the project Araya is situated in sector-62, Gurugram, therefore, the hon'ble authority has territorial jurisdiction to try the present complainants. As the project in question is situated in planning area of Gurugram, therefore the authority has complete territorial jurisdiction vide notification no.1/92/2017-1TCP issued by Arun Kumar Gupta, Principal Secretary (Town and



Country Planning) dated 14.12.2017 to entertain the present complaint. As the nature of the real estate project is commercial in nature so the authority has subject matter jurisdiction along with territorial jurisdiction.

52. **Jurisdiction of the authority-** The objections raised by the respondent regarding jurisdiction of the authority stands rejected. The authority has complete jurisdiction to decide the complaint regarding 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.

53. 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. This view has been upheld by the Supreme Court in **civil appeal no.23512-23513 of 2017** and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view.



54. The authority is of the view that the project is registered with the authority. The occupation certificate has been received by the respondent on 23.07.2018 and the possession has been offered on 28.08.2018. The basic bone of contention inter-se the parties is with regard to the date of delivery of possession. As per clause 11.1 of the builder buyer agreement dated 25.06.2012, the possession of the flat was to be delivered within a period of 39 months from the date of excavation including a grace period of 180 days as a grace period. Due date of possession is to be calculated from the date of execution of the agreement since the payment schedule does not have the date the date of start of excavation. Thus, the due date of possession comes out to be 25.03.2016.

55. The occupation certificate was received on 23.07.2018 and the offer of possession has been made on 28.08.2018. In the prevailing circumstances, both the parties are directed to takeover/handover the possession within one month and to adjust the delayed charges. No holding charges will be charged. The compensation already paid for late delivery of Rs. 15,94,540/- will be adjusted/deducted against delayed possession charges and the waiver if any, sought as a favour will be adjusted in the overall calculation sheet.



56. Decision and directions of the authority

The authority, exercising powers vested in it under section 37 of the Real Estate (Regulation and Development) Act, 2016 hereby issue the following directions to the respondent:

- (i) The respondent is directed to pay the complainant delayed possession charges @10.75% p.a w.e.f 25.03.2016 till offer of possession i.e 28.08.2018 under the provisions of section 18(1) of the Act.
- (ii) The arrears of interest accrued so far shall be paid by the respondent to the complainant within a period of 90 days from the date of issuance of this order.
- (iii) No holding charges shall be charged.
- (iv) The compensation already paid for late delivery shall be adjusted/deducted against delayed possession charges, waiver if any, sought as afavour shall be adjusted in the overall calculation sheet.



57. The complaint is disposed of accordingly.

58. The order is pronounced.

59. Case file be consigned to the registry.

(Samir Kumar)
Member

(Subhash Chander Kush)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Date: 15.03.2019

Judgement Uploaded on 25.4.2019



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