

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

Complaint no. : 124 of 2021
First date of hearing: 30.03.2021
Date of decision : 21.09.2021

1. Jasbir Kaur
2. Adarsh Pal Singh

Complainants

Address: - 801, Tower-14A, Vipul Greens,
Sohna Road, Sector -48, Gurugram-122018.

Versus

ORRIS Infrastructure Pvt. Ltd.
Office address: - C-3/260, Janankpuri, New
Delhi - 110058.
Also at: J-10/5, DLF Phase - II, Mehrauli-
Gurgaon Road - 122002.

Respondent

CORAM:
Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:
Ms. Tuhi Singh
Ms. Charu Rustagi

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 18.01.2021 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 under the provision of the Act or the rules and regulations made there under or 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.	Project name and location	Aster Court Premier, Sector 85, Gurugram.
2.	Project area	25.018 acres
3.	Nature of the project	Residential Housing Project
4.	DTCP license no. and validity status	39 of 2009 dated 24.07.09 valid upto 24.07.19 & 99 of 2011 dated 17.11.2011 valid upto 16.11.2021
5.	Name of licensee	1. M/s Radha Estate Pvt. Ltd. 2. M/s Elegant Land and Housing Pvt. Ltd. 3. M/s Salmon Land and Housing Pvt. Ltd. 4. BE Office Automation Products Pvt. Ltd. and 6 others
6.	RERA Registered/ not registered	Registered vide Registration no 19 of 2018

		dated 13.10.2018 valid till 30.10.2020
7.	Unit no.	702, 7th Floor, Block No. 4B
8.	Unit measuring	2410 sq. ft. (As per apartment buyer agreement - page 30)
9.	Date of execution of Buyers Agreement	14.04.2012 (Page 27, annexure C3 of the complaint)
10.	Payment plan	Construction linked payment plan payment plan (Page 52 of the complaint)
11.	Total sale consideration	Rs. 1,13,43,780/- (As per statement of account dated 19.09.2016 on page 58 of the reply)
12.	Total amount paid by the complainants	Rs. 1,05,46,595 /- (As per statement of account dated 19.09.2016 on page 58-63 of the complaint)
13.	Date of sanction of building plans	10.04.2012 (As per project details)
14.	Date of commencement of construction	Not provided
15.	Due date of delivery of possession (As per clause 10.1 within a period of 36 months from the date of start of construction or sanction of building plans or date of execution of agreement, whichever is later)	14.04.2015 (No grace period is given) (Due date is calculated from the date of execution of agreement)
16.	Offer of possession	Not offered

17.	Delay in handing over possession till 21.09.2021	06 years, 5 months and 8 days
18	Occupation Certificate received on	Not received

B. Facts of the complainants

3. The complainants have made the following submissions:

- i. That the complainants herein made the application for booking with the respondent company and also made the payment of the booking amount on 13.03.2012 of Rs 4,50,000/- in the project, 'Aster Court Premier' (hereinafter, 'the project'). The respondent company, after accepting the booking amount and application allotted the unit no. 702, 7th floor, tower 4B ad-measuring 2140 sq. ft. in the name of the complainants for the total sale consideration of Rs 1,10,54,580/-. The allotment letter was issued on 15.03.2012 by the respondent company to the complainants.
- ii. That several demands were raised by the respondent company even before the execution of the (hereinafter, ABA). The complainants, who had made the payment of the booking amount were further constrained to shell out money to satisfy the letter of the demand raised by the respondent company time and again.

- iii. That the terms of the ABA dated 14.04.2012 were totally one sided and arbitrary. The complainants were constrained to put their signatures on the one sided and unilateral agreement as they had already made the payment of substantial amount to the respondent company.
- iv. That not only has the respondent company indulged in 'unfair trade practices' as defined under the Consumer Protection Act, 1986, it has further failed to deliver the possession of the flat to the complainants as promised at the time of the booking in the year 2012.
- v. That as per clause 10.1 of the agreement, the complainants were promised possession of the flat within a period of three years from the execution of the ABA with the grace period of 6 months but the same has not been delivered till date. That the demand for the commencement of construction was raised and debited by the respondent company on 05.04.2012 and whereas the ABA was executed between the parties on 14.04.2012. Clearly, the possession of the apartment was due on 14.04.2015 with the grace period of 6 months. The respondent company has failed to deliver the possession of the unit within the promised time frame.

- vi. That the complainants on the other hand have been regularly making the payments of the installments to the respondent company as and when demanded. It is submitted that till date the complainants have already made the payment to the tune of Rs 1,05,46,595/- but despite such huge amount of payment, the respondent company has failed to deliver the possession of the unit to the complainants.
- vii. That the complainants are aggrieved by the huge delay caused by the respondent company in completing the development and construction of the project. The respondent company has never come forward with any explanation for the huge and inordinate delay caused by it in completing the project. The possession of the unit/flat has been due since 14.04.2015 but till date the respondent company has not come forward with any explanation for the delay in completion and development of the project.
- viii. It is submitted that the complainants who are presently outside India, requested their relatives to visit the project site, who had tried to inspect the property but were not allowed to enter the project premises by the guards as the work on the site is still under construction. The complainants, on further

enquiry, came to know that the project till date is incomplete as the basic amenities in the project are still unavailable. The construction material including machinery is till date present on the site. That even the construction update on the website of the respondent company does not show any pictorial update. Rather the expected possession is shown as June 2020.

- ix. That the respondent company drew an agreement that was unfair and arbitrary which was totally one-sided, illegal, unfair, unjust and arbitrary. All the clauses regarding possession, compensation etc were drawn in their own favour and the complainants had no say in anything whatsoever. In the agreement, the complainants were denied fair scope of compensation, in case of delay of possession and was suppose to pay heavy penalty in case of delay in payment of installments. The arbitrary and unfairness of the ABA can be derived from the perusal of clauses 8 and 11.5.
- x. That while in the case of the delay in the making of payment of installments by the complainants the respondent company retained the right to cancel the allotment or charge 18% delay penalty on the complainants, the complainants were only made entitled to Rs 5/- per sq ft of the super area per month. It

is requested that as the terms and conditions of the builder buyer agreement are unilateral, this authority shall not take into consideration the terms and conditions of the agreement during the adjudication of the case.

- xi. That such unilateral agreements have already been held to be illegal and arbitrary and inapplicable while deciding the compensation for the allottees by several courts. It is submitted that the complainant's mother is a laywoman and had no idea that the opposite Party would indulge in such practices illegal malpractices.
- xii. That since booking till date, the respondent never informed the complainants about any force majeure or any other circumstances which is beyond their reasonable control, which has led to the delay in the completion of the project within the time prescribed in the agreement. It is clear that the delay in the construction of the project is intentional and solely due to the deliberate negligence and deficiency on the part of the respondent. The delay of 5 years is not reasonable and no reason can be attributed to such delay except the wilful and deliberate negligence and ignorance of the respondent. The respondent started the project with malafide intention and

with the intention of cheating the allottees/homebuyers and extracting money from them.

- xiii. That there is no provision in the agreement which mandates or even mentions the consent of the complainants and imposes unilateral changes made by the respondent. That these clauses have established the unilaterality of the agreement where the respondents have very cleverly tried to close all the gates for the complainants to seek protection under any terms of the agreement. That the Act of 2016 has clearly pressed on terms like interest and consent which have been blithely contravened by the respondent. That the authority is requested to take a note of all these factors so that the present case can be a deterrent for the arbitrary and illegal behaviour of the big companies, which is inclined to exploit the buyer
- xiv. That respondent has failed to abide by their promise and failed to deliver the possession of the unit within the promised time. In such circumstances, it is only fair that the respondent be directed to deliver the immediate peaceful possession of the unit complete in all aspects along with all the promised amenities and in a habitable condition to the satisfaction of

complainants along with delay compensation @18% p.a. and other compensation.

xv. That the complainants are left with no other option but to file the present complaint seeking peaceful possession and delay compensation.

C. Relief sought by the complainants:

4. The complainants have sought the following reliefs:

- i. To direct the respondent to deliver immediate possession of the booked unit complete in all aspect and with full specifications in a habitable condition after obtaining the valid occupation certificate and completion certificate from the authority.
- ii. To direct the respondent to make the payment of delay interest at prescribed rate of interest on the amount paid by the complainant to the respondent, from the promised date of delivery of the flat till the actual delivery of the flat to the complainants.

D. Reply by the respondent:-

5. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

- i. That the present complaint pertains to possession along with compensation for a grievance under section 18 of the Act and is required to be filed before the adjudicating officer under rule-29 of the rules and not before this authority under rule-28. In the present case, the complainants are seeking possession of the apartment along with compensation and other reliefs. That the complainants have filed the present complaint under rule-28 of the said rules and is seeking the possession of the apartment, compensation and interest under section 18 of the said Act. It is submitted that the complaint, if any, is required to be filed before the adjudicating officer under rule-29 and not before this authority under rule-28 as the authority has no jurisdiction whatsoever to entertain such complaint and as such the complaint is liable to be rejected on this ground alone.
- ii. That in the present case as per clause 10.1 of the ABA dated 14.04.2012, the respondent was supposed to hand over the possession within a period of 36 months from the date of the signing of agreement or within 36 months plus 6 months grace period i.e. altogether 42 months from the date of execution of ABA by the company or sanctions of plans or commencement of construction whichever is later.
- iii. That the respondent has further held that the time for giving possession comes out to be 42 months and can be further

increased if the respondent-builder faces hardships or due to the conditions mentioned under clause 11.1, 11.2, 11.3 and 38 of the ABA. Clause 11.1 is reproduced below:

"11.1 Delay due to reasons beyond the control of the Company If, however, the completion of the said Building / said Complex is delayed by reason of non - availability of steel and/or cement or other building materials or water supply or electric power or slow down, strike or due to dispute with the construction agency(ies) employed by the Company, lock-out or civil commotion, by reason of war or enemy action or terrorist action or earthquake or any act of God or if non - delivery for possession is as a result of any Act, Notice, Order, Rule and Notification of the Government and / or any other Public or Competent Authority or due to delay in sanction of building / zoning plans, grant of completion / occupation certificate by any Competent Authority or for any other reasons beyond the control of the Company then the Allottee agrees that the Company shall be entitled to the extension of time for delivery of possession of the said Apartment. The Company, as a result of such contingency arising, reserves the right to alter or vary the terms and conditions of this Apartment Buyer Agreement or if the circumstances beyond the control of the Company so warrant, the Company may suspend the Scheme for such period as it may consider expedient and the Allottee agrees not to claim compensation / loss / damages of any nature whatsoever (including the compensation stipulated in Clause (11.5) of this Apartment Buyer Agreement) during the period of suspension of the Scheme."

- iv. That clause 11.2 is "failure to deliver possession due to non-approval of building plan". As per the project report of the said project, approval for the building plan has already been received dated 10.04.2012 and the approval no. being ZP-556-JD(BS)/2012/5150.
- v. That in the intervening period when the construction and development was under progress, there were various factors because of which the construction works had to be put on hold due to reasons beyond the control of the respondent. It is

submitted that the parties have agreed that if the delay is on account of force majeure conditions, the respondent shall not be liable for performing its obligations. It is submitted that the project got delayed and proposed possession timelines could not be completed on account of various reasons few of which are stated below.

- vi. That in the year, 2012 on the directions of the Supreme Court, the mining activities of minor minerals (including sand) were regulated. Supreme Court directed framing of Modern Mineral Concession Rules. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the ncr region. Further, it is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities by the newly allotted mining contracts were stayed on the Yamuna river bed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the National Green Tribunal. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially.

vii. That it is important to highlight that on account of non-payment of installments/dues (along with agreed amount of interest on such delayed payments) of this construction linked allotment by the respondent, it has been hard for the respondent to gather funds for the development of the project which is also one of the major reasons for delay in delivery of the project. It appears that it has become a trend amongst the allottees' nowadays to first not to pay of the installments due or considerably delay the payment of the same and later on knock the doors of the various courts seeking refund of the amount along with compensation or delayed possession compensation, thus taking advantage of their own wrongs, whereas the developer comes under severe resource crunch leading to delays in construction or/and increase in the cost of construction thereof putting the entire project in jeopardy. The crux of the matter which emerges from the aforesaid submission is that had the complainants as well as other similarly situated persons paid of their installments in time, the respondent developer would have sufficient funds to complete the project which is not the case herein. By failing to deposit the installments on time the complainants have violated his contractual commitment and are estopped from raising any plea of delay in construction. Haryana Real Estate Regulatory Authority having been enacted by the legislature

with the motive of balancing the rights and liabilities of the developer as well as the allottees, thus the complaint is liable to be dismissed on the this ground itself.

- viii. That the completion of project requires availability of infrastructure like road, water supply, electricity supply, sewerage, etc. and after charging EDC and IDC from the promoter, the Haryana Urban Development Authority has failed to provide the same. The promoter has paid all dues towards the said IDC and EDC however, till date no infrastructure has not been developed. Thus, due to the non-availability of basic infrastructure which was supposed to be developed by competent authorities, it is very difficult for the real estate developers to meet the timeline.
- ix. That it is pertinent to mention here that the respondent had already applied for fire NOC and occupation certificate for the aforesaid towers falling in phase-I. According to Haryana Real Estate Regulatory Authority registration, the date of completion of the project was 30.6.2020 which was duly extended due to COVID-19 by a period of 6 months i.e. upto 30.12.2020, vide Order dated 26.5.2020 passed by Haryana Real Estate Regulatory Authority. Thus, the respondent is already in receipt of the fire NOC, thus no delay accountability can be ascertained upon the respondent for the year 2020 due to the ongoing pandemic.

- x. That in addition to the grounds as mentioned above, the project was also delayed due to on-going litigation filed by one of the collaborator/ landowner of land in the project - BE Automation Products (P) Ltd. who was the owner of only 5.8 acres of land in the entire project. BE Automation Products (P) Ltd. indulged in frivolous litigation and put restraints in execution of the project and sale of apartments. BE Automation Products (P) Ltd. filed cases against the company in each and every forum to create nuisance.
- xi. That a collaboration agreement dated 22.10.2007 was executed between the respondent and BE Automation Products (P) Ltd. setting out the terms and conditions of the collaboration. The said collaboration agreement also provided for the area entitlement of both the parties in the area to be developed on the 25.018 acres and the same was to be calculated on basis of saleable area attributable to 5.8 acres as contributed by BE Automation Products (P) Ltd.
- xii. That after the aforesaid agreement with BE Automation Products (P) Ltd. in 2007, the respondent had acquired 4.5 acres additional land by the virtue of which more flats could have been constructed. BE Automation Products (P) Ltd., by misrepresenting the collaboration agreement raised a claim that it was entitled to proportionate share in the construction on the additional land acquired by the respondent. That after

the aforesaid event BE Automation Products (P) Ltd. moved court and filed an application under section 9 of the Arbitration and Conciliation Act, 1996 before the Additional District and Sessions Judge, Gurgaon (hereinafter, ADJ).

xiii. That the ADJ granted a blanket stay in favour of BE Automation Products (P) Ltd. and against the respondent, whereby the respondent was restrained from creating third party interest in respect of any apartments, villas and commercial areas till the matter could be decided finally by the arbitrator. The respondent was also restrained from receiving any money in respect of sale of apartments, villas and commercial sites etc. Or club membership charges or in any other form from any person.

xiv. That after the above said stay order was passed, the respondent filed F.A.O. No. 9901 of 2014 (O&M) whereby Punjab and Haryana High Court vacated the stay. Then the respondent and BE Automation Products (P) Ltd. went for arbitration and J. Chandramauli Kumar Prasad (retd.), was appointed as sole arbitrator to adjudicate and decide the dispute between the two parties by the High Court v.de order dated 30.01.2015. Final award was granted on 12.12.2016 whereby contentions of the respondent were upheld and the share of BE Automation Products (P) Ltd. was restricted to the original 82 flats selected by it. The dispute between the

respondent and BE Automation Products (P) Ltd. was further raised on various platforms and the respondent claims that the BE Automation Products Pvt Limited is also responsible for the delay in the construction of the project on account of various frivolous litigation initiated by the same.

E. Jurisdiction of the authority

6. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

8. 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) leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings of the authority on the objections raised by the respondent:

9. With regards to the above contentions raised by the promoter/developer, it is worthwhile to examine following issues:

F1. Admissibility of grace period due to various orders by NGT and other judicial bodies

10. The respondent has raised an objection that the time of giving possession comes out to be 42 months and got delayed further due to numerous orders passed by NGT and other judicial bodies. This led to respondent facing commercial hardships to collect raw materials, labour for the completion of the said project in timely manner.

11. The respondent has relied upon various NGT orders for justifying the delay caused in completion of the project and to seek extension in the time-period. However, the various orders as placed on record do not pertain to the ban of construction activity in the state of Haryana, particularly in Gurugram. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved

by the promoters themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoters has not assigned such compelling reasons as to why and how they shall be entitled for further extension of time six months in delivering the possession of the unit.

12. The authority is of the view that commercial hardships does not give the respondent an exception to not perform the contractual obligations. The promoter had proposed to hand over the possession of the apartment by 14.04.2015 and further provided in agreement that promoter shall be entitled to a grace periods of six month each unless there is a delay for reason mentioned in clauses 11.1, 11.2, 11.3 and 38. As a matter of fact, the promoter has not given the valid reason for

delay to complete the project within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace periods of six months each cannot be allowed to the promoter at this stage.

F2. Non-payment of installments by the complainants and other allottees

13. The respondent has raised another objection that due to non-payment of installments by the complainants and other allottees, he faced a financial crunch and wasn't able to finish the project on time. The objection raised by the respondent regarding delay in making timely payments by the complainants who have committed breach of terms and conditions of the contract by making default in timely payment of the installments which has led to delay in completion of construction at the end of respondent.

14. That the ABA was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by the complainants after properly understanding each and every clause contained in the agreement. The complainants were neither forced nor influenced by respondent to sign the said agreement. It was the

complainants who after understanding the clauses signed the said agreement in their complete senses.

15. In the present complaint, it is an obligation on the part of the complainants/ allottees to make timely payments under section 19(6) and 19(7) of the Act. Section 19(6), (7) proviso read as under.

Section 19: - Right and duties of allottees. -

Section 19(6) states that every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13(1), shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, maintenance charges, ground rent, and other charges, if any.

Section 19(7) states that the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

16. The authority has observed that the total consideration of the apartment of Rs. 1,13,43,780/- and the allottees have paid Rs. 1,05,46,595/-. The allottee has failed to make payment despite several demand letters and reminders issued by the promoter. As per clause B of ABA, it is the obligation of the allottee to make timely payments and the relevant clause is reproduced as under:

B. Time is the Essence; Buyer's Obligation

Time is the essence with respect to the Allottee's obligations of the Buyer to pay the price of the said Apartment in accordance with the Schedule of Payments as given in Annexure-I along with other

payments such as applicable stamp duty, registration fee, Taxes and other charges stipulated under this Apartment Buyer Agreement to be paid on or before due date or as and when demanded by the Company as the case may be and also perform or observe all other obligations of the Allottee under this Apartment Buyer Agreement. It is clearly agreed and understood by the Allottee that it shall not be obligatory on the part of the Company to send Demand Notices/ reminder regarding the payment to be made by the Allottee as per Schedule of Payments (Annexure-I) or obligations to be performed by the Allottee. In the event the Allottee fails to make the payments on or before the due date, the Company may cancel the allotment made herein. However, in case of any default/ delay in payment by the Allottee, the Company may, at its sole option and discretion, without prejudice to its rights as set out in Clauses (4) and (12) of this Agreement, waive the breach by the Allottee in not making the payments as per the Schedule of Payments given in Annexure I but on condition that the Allottee shall pay to the Company interest which shall be charged after due date @ 15% per annum for the first ninety days from the date it was due and 18% per annum for all periods exceeding first ninety days. It is made clear and so agreed by the Allottee that the exercise of discretion by the Company in case of one Allottee shall not be construed to be precedent and/ or binding on the Company to exercise such discretion in case of other Allottees."

17. The allottees have paid 86% of the total sale consideration as per the statement of account dated 19.09.2016 on page 58-63 of the complaint. Thus, the allottee cannot be said to be in violation of their duties and obligations arising out of sections 19 (6) and (7) nor clause 8 of the ABA.

F3. Delay due to ongoing pandemic in getting required approvals from various competent authorities

18. The respondent has raised an objection that the delay in getting occupation certificate and other necessary approvals

has been caused due to the ongoing pandemic and lockdown imposed by the government in return. There are certain statutory formalities that are to be complied with before the submission of application for grant of occupation certificate. The respondent has nowhere claimed that they have applied for the occupation certificate for the said tower. Thus, as the builder-respondent failed to apply for OC within the period of 36 months and the possession has not been offered yet, the respondent cannot claim benefit of the grace period of six months.

F4. Delay due to on-going litigation filed by collaborator/ landowner

19. The last objection raised by the respondent is that there was delay in development of the project as the respondent was involved in litigation at various forums and arbitration proceedings with the landowner/ collaborator. The authority is of the view that the various proceedings between the respondent and the collaborator were ongoing till 15.03.2017 (fact admitted by the respondent) and the possession has not been offered till the date of the order. Thus, the respondent's claim for getting the delay condone is rejected as an innocent allottee should suffer because of the dispute between the promoters.

G. Findings on the relief sought by the complainants**G.1. Admissibility of delay possession charges at prescribed rate of interest**

20. In the present complaint, the complainants intend to continue with the project and are 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

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."

21. The possession clause 10.1 of the ABA is reproduced below:

10.1 Schedule for possession of the said apartment

"The company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/ said Apartment within the period of 36 months plus grace period of 6 months from the date of execution of the Apartment Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1), (11.2), (11.3) and Clause (30) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure I or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any terms or conditions of this Apartment Buyer Agreement."

22. 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 the complainants not being in default under

any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter 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 buyer's 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.

23. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of start of construction or execution of the agreement, whichever is later. In the present complaint, the date of start of construction has not been provided therefore, the due date of handing over possession comes out to be 14.04.2015 which is calculated from date of execution of agreement i.e., 14.04.2012. It is further provided in agreement that promoter shall be entitled to a grace period of 6 months for pursuing the occupancy certificate etc. from DTCP under

the Act in respect of the project. As a matter of fact, the respondent has himself admitted that he has not received the occupation certificate in respect of the said tower. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of six months cannot be allowed to the promoter at this stage.

24. Admissibility of delay possession charges at prescribed rate of interest: The complainants are seeking delay possession charges at simple interest. However, proviso to section 18 provides that where allottees don't 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. The same 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)

"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."

25. The legislature in its wisdom in the subordinate legislation under 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.

26. 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., 21.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

27. **Rate of interest to be paid by complainants for delay in making payments:** 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—

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 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;"

32. 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 same as is being granted to the complainants in case of delayed possession charges.

34. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is 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 10.1 of the buyer's agreement executed between the parties on 14.04.2012, possession of the said unit was to be delivered within a period of 36 months from the date of execution of agreement, sanction of building plans or start of construction. The date of sanction of building plans is 10.04.2012, the date of start of construction has not been provided. Thus, the due date of possession is calculated from the from the date of execution of agreement i.e. 14.04.2012, as it is later. The respondent-builder had claimed a grace period of 6 months because of circumstances out of the control of the company (clause 11.1), delay in getting approval of building plans (clause 11.2), also because of the delay caused due to government orders (11.3) and clause 3B that the allottees to pay for the super area proportionate to their share. The grace period cannot be allowed to the respondent as the delay in getting a government document i.e., occupation certificate from the competent authority was due to the failure of the builder/ promoter to complete the project on time and the occupation certificate has not been obtained till the date of

the order nor the possession has been offered. Thus, as far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore the due date of possession comes out be 14.04.2015. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 14.04.2012 executed between the parties.

- i. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants is entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 14.04.2015 till the handing over of possession after obtaining occupation certificate.

H. Directions of the authority

35. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- ii. The respondent is directed to pay the 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. 14.04.2015 till the handing over of possession after obtaining occupation certificate.

- iii. The arrears of such interest accrued from 14.04.2015 till 21.09.2021 shall be paid by the promoter to the allottee within a period of 90 days from the date of this order and thereafter monthly payment of interest till the offer of possession shall be paid on or before 10th of each subsequent month.
- iv. The complainants are directed to make the outstanding payments, if any, to the respondent alongwith prescribed rate of interest i.e., equitable interest which has to be paid by both the parties in case of failure on their respective parts.
- v. The respondent shall not charge anything from the complainants which is not the part of the apartment buyer's agreement. The respondent is debarred from claiming holding charges from the complainants/allottees at any point of time even after being part of the builder buyer's agreement as per law settled by hon'ble Supreme Court in **civil appeal nos. 3864-3889/2020 decided on 14.12.2020.**

36. Complaint stands disposed of.

37. File be consigned to registry.

(Samir Kumar)

Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.09.2021.

(Vijay Kumar Goyal)

Member

the order nor the possession has been offered. Thus, as far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore the due date of possession comes out to be 14.04.2015. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 14.04.2012 executed between the parties.

35. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants are entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 14.04.2015 till 21.11.2021 as per provisions of section 18 (1) of the Act read with rule 15 of the rules.

H. Directions of the authority

36. Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the 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

- iii. The arrears of such interest accrued shall be paid by the promoter to the allottee within a period of 90 days from the date of this order and thereafter monthly payment of interest till the offer of possession shall be paid on or before 10th of each subsequent month.
- iv. The complainants are directed to make the outstanding payments, if any, to the respondent alongwith prescribed rate of interest i.e., equitable interest which has to be paid by both the parties in case of failure on their respective parts.
- v. The respondent shall not charge anything from the complainants which is not the part of the apartment buyer's agreement.

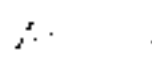
36. Complaint stands disposed of.

37. File be consigned to registry.


(Samir Kumar)
Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.09 2021.


(Vijay Kumar Goyal)
Member

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

Complaint no. : 124 of 2021
First date of hearing : 30.03.2021
Date of decision : 21.09.2021

1. Jasbir Kaur
2. Adarsh Pal Singh

Complainants

Address: - 801, Tower-14A, Vipul Greens,
Sohna Road, Sector -48, Gurugram-122018.

Versus

ORRIS Infrastructure Pvt. Ltd.
Office address: - C-3/260, Janankpuri, New
Delhi - 110058.
Also at: J-10/5, DLF Phase - II, Mehrauli-
Gurgaon Road - 122002.

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

Member
Member

APPEARANCE:

Ms. Tuhi Singh
Ms. Charu Rustagi

Advocate for the complainants
Advocate for the respondent

ORDER

1. The present complaint dated 18.01.2021 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 under the provision of the Act or the rules and regulations made there under or 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.	Project name and location	Aster Court Premier, Sector 85, Gurugram.
2.	Project area	25.018 acres
3.	Nature of the project	Residential Housing Project
4.	DTCP license no. and validity status	39 of 2009 dated 24.07.09 valid upto 24.07.19 & 99 of 2011 dated 17.11.2011 valid upto 16.11.2021
5.	Name of licensee	1. M/s Radha Estate Pvt. Ltd. 2. M/s Elegant Land and Housing Pvt. Ltd. 3. M/s Salmon Land and Housing Pvt. Ltd. 4. BE Office Automation Products Pvt. Ltd. and 6 others
6.	RERA Registered/ not registered	Registered vide Registration no. 19 of 2018

		dated 13.10.2018 valid till 30.10.2020
7.	Unit no.	702, 7th Floor, Block No. 4B
8.	Unit measuring	2410 sq. ft. (As per apartment buyer agreement - page 30)
9.	Date of execution of Buyers Agreement	14.04.2012 (Page 27, annexure C3 of the complaint)
10.	Payment plan	Construction linked payment plan payment plan (Page 52 of the complaint)
11.	Total sale consideration	Rs. 1,13,43,780/- (As per statement of account dated 19.09.2016 on page 58 of the reply)
12.	Total amount paid by the complainants	Rs. 1,05,46,595 /- (As per statement of account dated 19.09.2016 on page 58-63 of the complaint)
13.	Date of sanction of building plans	10.04.2012 (As per project details)
14.	Date of commencement of construction	Not provided
15.	Due date of delivery of possession (As per clause 10.1 within a period of 36 months from the date of start of construction or sanction of building plans or date of execution of agreement, whichever is later)	14.04.2015 (No grace period is given) (Due date is calculated from the date of execution of agreement)
16.	Offer of possession	Not offered

17.	Delay in handing over possession till 21.09.2021	06 years, 5 months and 8 days
18.	Occupation Certificate received on	Not received

B. Facts of the complainants

3. The complainants have made the following submissions:
- i. That the complainants herein made the application for booking with the respondent company and also made the payment of the booking amount on 13.03.2012 of Rs 4,50,000/- in the project, 'Aster Court Premier' (hereinafter, 'the project'). The respondent company, after accepting the booking amount and application allotted the unit no. 702, 7th floor, tower 4B ad-measuring 2140 sq. ft. in the name of the complainants for the total sale consideration of Rs 1,10,54,580/-. The allotment letter was issued on 15.03.2012 by the respondent company to the complainants.
 - ii. That several demands were raised by the respondent company even before the execution of the (hereinafter, ABA). The complainants, who had made the payment of the booking amount were further constrained to shell out money to satisfy the letter of the demand raised by the respondent company time and again.

- iii. That the terms of the ABA dated 14.04.2012 were totally one sided and arbitrary. The complainants were constrained to put their signatures on the one sided and unilateral agreement as they had already made the payment of substantial amount to the respondent company.
- iv. That not only has the respondent company indulged in 'unfair trade practices' as defined under the Consumer Protection Act, 1986, it has further failed to deliver the possession of the flat to the complainants as promised at the time of the booking in the year 2012.
- v. That as per clause 10.1 of the agreement, the complainants were promised possession of the flat within a period of three years from the execution of the ABA with the grace period of 6 months but the same has not been delivered till date. That the demand for the commencement of construction was raised and debited by the respondent company on 05.04.2012 and whereas the ABA was executed between the parties on 14.04.2012. Clearly, the possession of the apartment was due on 14.04.2015 with the grace period of 6 months. The respondent company has failed to deliver the possession of the unit within the promised time frame.

- vi. That the complainants on the other hand have been regularly making the payments of the installments to the respondent company as and when demanded. It is submitted that till date the complainants have already made the payment to the tune of Rs 1,05,46,595/- but despite such huge amount of payment, the respondent company has failed to deliver the possession of the unit to the complainants.
- vii. That the complainants are aggrieved by the huge delay caused by the respondent company in completing the development and construction of the project. The respondent company has never come forward with any explanation for the huge and inordinate delay caused by it in completing the project. The possession of the unit/flat has been due since 14.04.2015 but till date the respondent company has not come forward with any explanation for the delay in completion and development of the project.
- viii. It is submitted that the complainants who are presently outside India, requested their relatives to visit the project site, who had tried to inspect the property but were not allowed to enter the project premises by the guards as the work on the site is still under construction. The complainants, on further

enquiry, came to know that the project till date is incomplete as the basic amenities in the project are still unavailable. The construction material including machinery is till date present on the site. That even the construction update on the website of the respondent company does not show any pictorial update. Rather the expected possession is shown as June 2020.

- ix. That the respondent company drew an agreement that was unfair and arbitrary which was totally one-sided, illegal, unfair, unjust and arbitrary. All the clauses regarding possession, compensation etc were drawn in their own favour and the complainants had no say in anything whatsoever. In the agreement, the complainants were denied fair scope of compensation, in case of delay of possession and was suppose to pay heavy penalty in case of delay in payment of installments. The arbitrary and unfairness of the ABA can be derived from the perusal of clauses 8 and 11.5.
- x. That while in the case of the delay in the making of payment of installments by the complainants the respondent company retained the right to cancel the allotment or charge 18% delay penalty on the complainants, the complainants were only made entitled to Rs 5/- per sq ft of the super area per month. It

is requested that as the terms and conditions of the builder buyer agreement are unilateral, this authority shall not take into consideration the terms and conditions of the agreement during the adjudication of the case.

- xi. That such unilateral agreements have already been held to be illegal and arbitrary and inapplicable while deciding the compensation for the allottees by several courts. It is submitted that the complainant's mother is a laywoman and had no idea that the opposite Party would indulge in such practices illegal malpractices.
- xii. That since booking till date, the respondent never informed the complainants about any force majeure or any other circumstances which is beyond their reasonable control, which has led to the delay in the completion of the project within the time prescribed in the agreement. It is clear that the delay in the construction of the project is intentional and solely due to the deliberate negligence and deficiency on the part of the respondent. The delay of 5 years is not reasonable and no reason can be attributed to such delay except the wilful and deliberate negligence and ignorance of the respondent. The respondent started the project with malafide intention and

with the intention of cheating the allottees/homebuyers and extracting money from them.

xiii. That there is no provision in the agreement which mandates or even mentions the consent of the complainants and imposes unilateral changes made by the respondent. That these clauses have established the unilaterality of the agreement where the respondents have very cleverly tried to close all the gates for the complainants to seek protection under any terms of the agreement. That the Act of 2016 has clearly pressed on terms like interest and consent which have been blithely contravened by the respondent. That the authority is requested to take a note of all these factors so that the present case can be a deterrent for the arbitrary and illegal behaviour of the big companies, which is inclined to exploit the buyer.

xiv. That respondent has failed to abide by their promise and failed to deliver the possession of the unit within the promised time. In such circumstances, it is only fair that the respondent be directed to deliver the immediate peaceful possession of the unit complete in all aspects along with all the promised amenities and in a habitable condition to the satisfaction of

complainants along with delay compensation @18% p.a. and other compensation.

xv. That the complainants are left with no other option but to file the present complaint seeking peaceful possession and delay compensation.

C. Relief sought by the complainants:

4. The complainants have sought the following reliefs:
 - i. To direct the respondent to deliver immediate possession of the booked unit complete in all aspect and with full specifications in a habitable condition after obtaining the valid occupation certificate and completion certificate from the authority.
 - ii. To direct the respondent to make the payment of delay interest at prescribed rate of interest on the amount paid by the complainant to the respondent, from the promised date of delivery of the flat till the actual delivery of the flat to the complainants.

D. Reply by the respondent:-

5. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

- i. That the present complaint pertains to possession along with compensation for a grievance under section 18 of the Act and is required to be filed before the adjudicating officer under rule-29 of the rules and not before this authority under rule-28. In the present case, the complainants are seeking possession of the apartment along with compensation and other reliefs. That the complainants have filed the present complaint under rule-28 of the said rules and is seeking the possession of the apartment, compensation and interest under section 18 of the said Act. It is submitted that the complaint, if any, is required to be filed before the adjudicating officer under rule-29 and not before this authority under rule-28 as the authority has no jurisdiction whatsoever to entertain such complaint and as such the complaint is liable to be rejected on this ground alone.
- ii. That in the present case as per clause 10.1 of the ABA dated 14.04.2012, the respondent was supposed to hand over the possession within a period of 36 months from the date of the signing of agreement or within 36 months plus 6 months grace period i.e. altogether 42 months from the date of execution of ABA by the company or sanctions of plans or commencement of construction whichever is later.
- iii. That the respondent has further held that the time for giving possession comes out to be 42 months and can be further

increased if the respondent-builder faces hardships or due to the conditions mentioned under clause 11.1,11.2, 11.3 and 38 of the ABA. Clause Clauses 11.1 is reproduced below:

"11.1 Delay due to reasons beyond the control of the Company If, however, the completion of the said Building / said Complex is delayed by reason of non - availability of steel and/or cement or other building materials or water supply or electric power or slow down, strike or due to dispute with the construction agency(ies) employed by the Company, lock-out or civil commotion, by reason of war or enemy action or terrorist action or earthquake or any act of God or if non - delivery for possession is as a result of any Act, Notice, Order, Rule and Notification of the Government and / or any other Public or Competent Authority or due to delay in sanction of building / zoning plans, grant of completion / occupation certificate by any Competent Authority or for any other reasons beyond the control of the Company then the Allottee agrees that the Company shall be entitled to the extension of time for delivery of possession of the said Apartment. The Company, as a result of such contingency arising, reserves the right to alter or vary the terms and conditions of this Apartment Buyer Agreement or if the circumstances beyond the control of the Company so warrant, the Company may suspend the Scheme for such period as it may consider expedient and the Allottee agrees not to claim compensation / loss / damages of any nature whatsoever (including the compensation stipulated in Clause (11.5) of this Apartment Buyer Agreement) during the period of suspension of the Scheme."

- iv. That clause 11.2 is "failure to deliver possession due to non-approval of building plan". As per the project report of the said project, approval for the building plan has already been received dated 10.04.2012 and the approval no. being ZP-556-JD(BS)/2012/5150.
- v. That in the intervening period when the construction and development was under progress, there were various factors because of which the construction works had to be put on hold due to reasons beyond the control of the respondent. It is

submitted that the parties have agreed that if the delay is on account of force majeure conditions, the respondent shall not be liable for performing its obligations. It is submitted that the project got delayed and proposed possession timelines could not be completed on account of various reasons few of which are stated below.

- vi. That in the year, 2012 on the directions of the Supreme Court, the mining activities of minor minerals (including sand) were regulated. Supreme Court directed framing of Modern Mineral Concession Rules. The competent authorities took substantial time in framing the rules and in the process the availability of building materials including sand which was an important raw material for development of the said project became scarce in the ncr region. Further, it is pertinent to state that the National Green Tribunal in several cases related to Punjab and Haryana had stayed mining operations including in O.A No. 171/2013, wherein vide order dated 2.11.2015 mining activities by the newly allotted mining contracts were stayed on the Yamuna river bed. These orders inter-alia continued till the year 2018. Similar orders staying the mining operations were also passed by the National Green Tribunal. The stopping of mining activity not only made procurement of material difficult but also raised the prices of sand/gravel exponentially.

vii. That it is important to highlight that on account of non-payment of installments/dues (along with agreed amount of interest on such delayed payments) of this construction linked allotment by the respondent, it has been hard for the respondent to gather funds for the development of the project which is also one of the major reasons for delay in delivery of the project. It appears that it has become a trend amongst the allottees' nowadays to first not to pay of the installments due or considerably delay the payment of the same and later on knock the doors of the various courts seeking refund of the amount along with compensation or delayed possession compensation, thus taking advantage of their own wrongs, whereas the developer comes under severe resource crunch leading to delays in construction or/and increase in the cost of construction thereof putting the entire project in jeopardy. The crux of the matter which emerges from the aforesaid submission is that had the complainants as well as other similarly situated persons paid of their installments in time, the respondent developer would have sufficient funds to complete the project which is not the case herein. By failing to deposit the installments on time the complainants have violated his contractual commitment and are estopped from raising any plea of delay in construction. Haryana Real Estate Regulatory Authority having been enacted by the legislature

with the motive of balancing the rights and liabilities of the developer as well as the allottees, thus the complaint is liable to be dismissed on the this ground itself.

- viii. That the completion of project requires availability of infrastructure like road, water supply, electricity supply, sewerage, etc. and after charging EDC and IDC from the promoter, the Haryana Urban Development Authority, has failed to provide the same. The promoter has paid all dues towards the said IDC and EDC however, till date no infrastructure has not been developed. Thus, due to the non-availability of basic infrastructure which was supposed to be developed by competent authorities, it is very difficult for the real estate developers to meet the timeline.
- ix. That it is pertinent to mention here that the respondent had already applied for fire NOC and occupation certificate for the aforesaid towers falling in phase-I. According to Haryana Real Estate Regulatory Authority registration, the date of completion of the project was 30.6.2020 which was duly extended due to COVID-19 by a period of 6 months i.e. upto 30.12.2020, vide Order dated 26.5.2020 passed by Haryana Real Estate Regulatory Authority. Thus, the respondent is already in receipt of the fire NOC, thus no delay accountability can be ascertained upon the respondent for the year 2020 due to the ongoing pandemic.

- x. That in addition to the grounds as mentioned above, the project was also delayed due to on-going litigation filed by one of the collaborator/ landowner of land in the project - BE Automation Products (P) Ltd. who was the owner of only 5.8 acres of land in the entire project. BE Automation Products (P) Ltd. indulged in frivolous litigation and put restraints in execution of the project and sale of apartments. BE Automation Products (P) Ltd. filed cases against the company in each and every forum to create nuisance.
- xi. That a collaboration agreement dated 22.10.2007 was executed between the respondent and BE Automation Products (P) Ltd. setting out the terms and conditions of the collaboration. The said collaboration agreement also provided for the area entitlement of both the parties in the area to be developed on the 25.018 acres and the same was to be calculated on basis of saleable area attributable to 5.8 acres as contributed by BE Automation Products (P) Ltd..
- xii. That after the aforesaid agreement with BE Automation Products (P) Ltd. in 2007, the respondent had acquired 4.5 acres additional land by the virtue of which more flats could have been constructed. BE Automation Products (P) Ltd., by misrepresenting the collaboration agreement raised a claim that it was entitled to proportionate share in the construction on the additional land acquired by the respondent. That after

the aforesaid event BE Automation Products (P) Ltd. moved court and filed an application under section 9 of the Arbitration and Conciliation Act, 1996 before the Additional District and Sessions Judge, Gurgaon (hereinafter, ADJ).

xiii. That the ADJ granted a blanket stay in favour of BE Automation Products (P) Ltd. and against the respondent, whereby the respondent was restrained from creating third party interest in respect of any apartments, villas and commercial areas till the matter could be decided finally by the arbitrator. The respondent was also restrained from receiving any money in respect of sale of apartments, villas and commercial sites etc. Or club membership charges or in any other form from any person.

xiv. That after the above said stay order was passed, the respondent filed F.A.O. No. 9901 of 2014 (O&M) whereby Punjab and Haryana High Court vacated the stay. Then the respondent and BE Automation Products (P) Ltd. went for arbitration and J. Chandramauli Kumar Prasad (retd.), was appointed as sole arbitrator to adjudicate and decide the dispute between the two parties by the High Court vide order dated 30.01.2015. Final award was granted on 12.12.2016 whereby contentions of the respondent were upheld and the share of BE Automation Products (P) Ltd. was restricted to the original 82 flats selected by it. The dispute between the

respondent and BE Automation Products (P) Ltd. was further raised on various platforms and the respondent claims that the BE Automation Products Pvt Limited is also responsible for the delay in the construction of the project on account of various frivolous litigation initiated by the same.

E. Jurisdiction of the authority

6. The preliminary objections raised by the respondent regarding jurisdiction of the authority to entertain the present complaint stands rejected. The authority observed that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

7. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana 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

8. 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) leaving aside

compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings of the authority on the objections raised by the respondent:

9. With regards to the above contentions raised by the promoter/developer, it is worthwhile to examine following issues:

F1. Admissibility of grace period due to various orders by NGT and other judicial bodies

10. The respondent has raised an objection that the time of giving possession comes out to be 42 months and got delayed further due to numerous orders passed by NGT and other judicial bodies. This led to respondent facing commercial hardships to collect raw materials, labour for the completion of the said project in timely manner.

11. The respondent has relied upon various NGT orders for justifying the delay caused in completion of the project and to seek extension in the time-period. However, the various orders as placed on record do not pertain to the ban of construction activity in the state of Haryana, particularly in Gurugram. It may be stated that asking for extension of time in completing the construction is not a statutory right nor has it been provided in the rules. This is a concept which has been evolved

by the promoters themselves and now it has become a very common practice to enter such a clause in the agreement executed between the promoter and the allottee. It needs to be emphasized that for availing further period for completing the construction the promoter must make out or establish some compelling circumstances which were in fact beyond his control while carrying out the construction due to which the completion of the construction of the project or tower or a block could not be completed within the stipulated time. Now, turning to the facts of the present case the respondent promoters has not assigned such compelling reasons as to why and how they shall be entitled for further extension of time six months in delivering the possession of the unit.

12. The authority is of the view that commercial hardships does not give the respondent an exception to not perform the contractual obligations. The promoter had proposed to hand over the possession of the apartment by 14.04.2015 and further provided in agreement that promoter shall be entitled to a grace periods of six month each unless there is a delay for reason mentioned in clauses 11.1, 11.2, 11.3 and 38. As a matter of fact, the promoter has not given the valid reason for

delay to complete the project within the time limit prescribed by the promoter in the apartment buyer's agreement. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace periods of six months each cannot be allowed to the promoter at this stage.

F2. Non-payment of installments by the complainants and other allottees

13. The respondent has raised another objection that due to non-payment of installments by the complainants and other allottees, he faced a financial crunch and wasn't able to finish the project on time. The objection raised by the respondent regarding delay in making timely payments by the complainants who have committed breach of terms and conditions of the contract by making default in timely payment of the installments which has led to delay in completion of construction at the end of respondent.

14. That the ABA was entered into between the parties and, as such, the parties are bound by the terms and conditions mentioned in the said agreement. The said agreement was duly signed by the complainants after properly understanding each and every clause contained in the agreement. The complainants were neither forced nor influenced by respondent to sign the said agreement. It was the

complainants who after understanding the clauses signed the said agreement in their complete senses.

15. In the present complaint, it is an obligation on the part of the complainants/ allottees to make timely payments under section 19(6) and 19(7) of the Act. Section 19(6), (7) proviso read as under.

"Section 19: - Right and duties of allottees.-

.....
*Section 19(6) states that every allottee, who has entered into an agreement for sale to take an apartment, plot or building as the case may be, under section 13[1], shall be responsible to make necessary payments in the manner and within the time as specified in the said agreement for sale and shall pay at the proper time and place, the share of the registration charges, municipal taxes, water and electricity charges, **maintenance charges**, ground rent, and other charges, if any.*

Section 19(7) states that the allottee shall be liable to pay interest, at such rate as may be prescribed, for any delay in payment towards any amount or charges to be paid under sub-section (6).

16. The authority has observed that the total consideration of the apartment of Rs. 1,13,43,780/- and the allottees have paid Rs. 1,05,46,595/-. The allottee has failed to make payment despite several demand letters and reminders issued by the promoter. As per clause 8 of ABA, it is the obligation of the allottee to make timely payments and the relevant clause is reproduced as under:

8. Time is the Essence: Buyer's Obligation

Time is the essence with respect to the Allottee's obligations of the Buyer to pay the price of the said Apartment in accordance with the Schedule of Payments as given in Annexure-I along with other

payments such as applicable stamp duty, registration fee, Taxes and other charges stipulated under this Apartment Buyer Agreement to be paid on or before due date or as and when demanded by the Company as the case may be and also perform or observe all other obligations of the Allottee under this Apartment Buyer Agreement. It is clearly agreed and understood by the Allottee that it shall not be obligatory on the part of the Company to send Demand Notices/ reminder regarding the payment to be made by the Allottee as per Schedule of Payments (Annexure-1) or obligations to be performed by the Allottee. In the event the Allottee fails to make the payments on or before the due date, the Company may cancel the allotment made herein. However, in case of any default/ delay in payment by the Allottee, the Company may, at its sole option and discretion, without prejudice to its rights as set out in Clauses (4) and (12) of this Agreement, waive the breach by the Allottee in not making the payments as per the Schedule of Payments given in Annexure 1 but on condition that the Allottee shall pay to the Company interest which shall be charged after due date @ 15% per annum for the first ninety days from the date it was due and 18% per annum for all periods exceeding first ninety days. It is made clear and so agreed by the Allottee that the exercise of discretion by the Company in case of one Allottee shall not be construed to be precedent and/ or binding on the Company to exercise such discretion in case of other Allottees."

17. The allottees have paid 86% of the total sale consideration as per the statement of account dated 19.09.2016 on page 58-63 of the complaint. Thus, the allottee cannot be said to be in violation of their duties and obligations arising out of sections 19 (6) and (7) nor clause 8 of the ABA.

F3. Delay due to ongoing pandemic in getting required approvals from various competent authorities

18. The respondent has raised an objection that the delay in getting occupation certificate and other necessary approvals

has been caused due to the ongoing pandemic and lockdown imposed by the government in return. There are certain statutory formalities that are to be complied with before the submission of application for grant of occupation certificate. The respondent has nowhere claimed that they have applied for the occupation certificate for the said tower. Thus, as the builder-respondent failed to apply for OC within the period of 36 months and the possession has not been offered yet, the respondent cannot claim benefit of the grace period of six months.

F4. Delay due to on-going litigation filed by collaborator/ landowner

19. The last objection raised by the respondent is that there was delay in development of the project as the respondent was involved in litigation at various forums and arbitration proceedings with the landowner/ collaborator. The authority is of the view that the various proceedings between the respondent and the collaborator were ongoing till 15.03.2017 (fact admitted by the respondent) and the possession has not been offered till the date of the order. Thus, the respondent's claim for getting the delay condone is rejected as an innocent allottee should suffer because of the dispute between the promoters.

G. Findings on the relief sought by the complainants

G.1. Admissibility of delay possession charges at prescribed rate of interest

20. In the present complaint, the complainants intend to continue with the project and are 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

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."

21. The possession clause 10.1 of the ABA is reproduced below:

10.1 Schedule for possession of the said apartment

"The company based on its present plans and estimates and subject to all just exceptions; contemplates to complete construction of the said Building/ said Apartment within the period of 36 months plus grace period of 6 months from the date of execution of the Apartment Buyer Agreement by the Company or Sanction of Plans or Commencement of Construction whichever is later, unless there shall be delay or there shall be failure due to reasons mentioned in Clauses (11.1), (11.2), (11.3) and Clause (38) or due to failure of Allottee(s) to pay in time the price of the said Apartment along with all other charges and dues in accordance with the schedule of payments given in Annexure 1 or as per the demands raised by the Company from time to time or any failure on the part of the Allottee(s) to abide by any terms or conditions of this Apartment Buyer Agreement."

22. 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 the complainants not being in default under

any provisions of these agreements and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favor of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter 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 buyer's 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.

- 23. Admissibility of grace period:** The promoter has proposed to hand over the possession of the said unit within period of 36 months from the date of start of construction or execution of the agreement, whichever is later. In the present complaint, the date of start of construction has not been provided therefore, the due date of handing over possession comes out to be 14.04.2015 which is calculated from date of execution of agreement i.e., 14.04.2012. It is further provided in agreement that promoter shall be entitled to a grace period of 6 months for pursuing the occupancy certificate etc. from DTCP under

the Act in respect of the project. As a matter of fact, the respondent has himself admitted that he has not received the occupation certificate in respect of the said tower. As per the settled law one cannot be allowed to take advantage of his own wrong. Accordingly, this grace period of six months cannot be allowed to the promoter at this stage.

- 24. Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at simple interest. However, proviso to section 18 provides that where allottees don't 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. The same 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]

"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."

- 25.** The legislature in its wisdom in the subordinate legislation under 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.

26. 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., 21.09.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.

27. **Rate of interest to be paid by complainants for delay in making payments:** 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—

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 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;"

~~28-32~~ 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 same as is being granted to the complainants in case of delayed possession charges.

29-34. On consideration of the documents available on record and submissions made by the parties regarding contravention as per provisions of the Act, the authority is satisfied that the respondent is 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 10.1 of the buyer's agreement executed between the parties on 14.04.2012, possession of the said unit was to be delivered within a period of 36 months from the date of execution of agreement, sanction of building plans or start of construction. The date of sanction of building plans is 10.04.2012, the date of start of construction has not been provided. Thus, the due date of possession is calculated from the from the date of execution of agreement i.e. 14.04.2012, as it is later. The respondent-builder had claimed a grace period of 6 months because of circumstances out of the control of the company (clause 11.1), delay in getting approval of building plans (clause 11.2), also because of the delay caused due to government orders (11.3) and clause 38 that the allottees to pay for the super area proportionate to their share. The grace period cannot be allowed to the respondent as the delay in getting a government document i.e., occupation certificate from the competent authority was due to the failure of the builder/ promoter to complete the project on time and the occupation certificate has not been obtained till the date of

the order nor the possession has been offered. Thus, as far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore the due date of possession comes out be 14.04.2015. The authority is of the considered view that there is delay on the part of the respondent to offer physical possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 14.04.2012 executed between the parties.


~~30.~~^{35.} Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such the complainants is entitled to delay possession charges at prescribed rate of the interest @ 9.30 % p.a. w.e.f. 14.04.2015 till 21.11.2021 as per provisions of section 18 (1) of the Act read with rule 15 of the rules.

H. Directions of the authority

~~31.~~^{36.} Hence, the authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoter as per the function entrusted to the authority under section 34(f):

- i. The respondent is directed to pay the 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 till handing over of possession or offer of possession plus 2 months whichever is earlier.


- ~~ii-iii~~ The arrears of such interest accrued shall be paid by the promoter to the allottee within a period of 90 days from the date of this order and thereafter monthly payment of interest till the offer of possession shall be paid on or before 10th of each subsequent month.
- ~~ii-iv~~ The complainants are directed to make the outstanding payments, if any, to the respondent alongwith prescribed rate of interest i.e., equitable interest which has to be paid by both the parties in case of failure on their respective parts.
- ~~iv~~ The respondent shall not charge anything from the complainants which is not the part of the apartment buyer's agreement.
- ~~32~~ 36. Complaint stands disposed of.
- ~~33~~ 37. File be consigned to registry.


(Samir Kumar)

Member


Haryana Real Estate Regulatory Authority, Gurugram

Dated: 21.09.2021.

V.1 - 
(Vijay Kumar Goyal)

Member

Corrected vide order dated 03.08.2022


60.
03.08.2022