BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	:	**3963 of 2020**
Date of filing complaint:		**10.11.2020**
First date of hearing	:	**22.12.2020**
Date of decision	:	**12.04.2022**

	Ms. Mandira Monga **R/o:** H.no: 251, Ashok Vihar, Phase-I, New Delhi-110052	**Complainant**
	Versus	
	M/s Vatika Limited **R/o:** Vatika Triangle, 4th floor, Sushant Lok, Phase-I, Block A, Mehrauli Gurgaon Road, Gurugram-122002, Haryana. **also at:** Vatika INXT City Centre, Vatika India Next, Sector-83, Gurugram-122012(HR)	**Respondent**

CORAM:	
Dr. K.K. Khandelwal	Chairman
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Gaurav Bhardwaj (Advocate)	Complainant
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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.

A. Unit and project related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Project name and location	"Gurgaon 21" Vatika India Next, Sector 83, Gurugram
2.	Project area	11.8 acres
3.	Nature of the project	Residential group housing complex
4.	DTCP license no. and validity status	83 of 2009 dated 07.12.2009 valid up to 06.12.2024 84 of 2008 dated 11.04.2008 valid up to 10.04.2020
5.	Name of licensee	M/s Mark Buildtech Pvt. Ltd. & M/s Growmore Buildtech Pvt. ltd.
6.	RERA Registered/ not registered	**Not registered**
7.	Date of execution of apartment buyer's agreement	15.05.2009 (page 41 of complaint)
8.	Unit no.	1805, 17th floor, block B2 (page 44 of complaint)
9.	Unit measuring (super area)	1737.32 sq.ft.
10.	Addendum to the apartment buyer's agreement	18.04.2011 (annexure P/3, page 86 of complaint)
11.	New unit as per addendum to the agreement	804 block A (annexure P/3, page 86 of complaint)
12.	New area	1733.40 sq.ft.

13.	Subsequent allottee namely Mandira Monga	Date not mentioned (page 84 of complaint)
14.	Transfer letter by the respondent to the complainant	04.05.2011 (annexure P/4, page 87 of complaint)
15.	Payment plan	Construction linked payment plan (page 71 of complaint)
16.	Total sale consideration	Rs. 57,29,522/- (as per statement of account dated 13.04.2017 at page 88, annexure P/5 of complaint)
17.	Total amount paid by the complainant	Rs. 59,55,678/- (as per statement of account dated 13.04.2017 at page 88, annexure P/5 of complaint)
18.	Due date of delivery of possession *Clause 10.1 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 a period of three years from the date of execution of this agreement.*	15.05.2012
19.	Offer of possession	24.08.2016 (annexure P/6, page 91 of complaint)
20.	Handing over the possession	24.09.2016 (annexure P/7, page 92 of complaint)
21.	Occupation Certificate	Not obtained

B. Facts of the complaint:

3. That somewhere around 2008-2010, the respondent advertised about its new residential group housing project namely "Gurgaon 21" located in Vatika India Next, Sector-83, Gurugram. The respondent painted a rosy picture of the project in its advertisement making tall claims and representing that the project aims at providing lush, landscaped greenery and contemporary

architecture, claiming that Gurgaon 21 blends the dynamism of a cosmopolitan lifestyle with the serenity of a well-planned, premium neighbourhood. The tagline of the project as advertised by the respondent was *"Living in the 21st century"*.

4. Relying on the abovesaid representations of the respondent company, the original owner/first buyer namely Sh. Rajesh Sachdeva booked an apartment in the said project on 15.04.2008 by paying the booking amount of Rs. 2,50,000. Accordingly, an apartment buyer agreement dated 15.05.2009 was executed between the said erstwhile owner and the respondent for unit bearing no. B2-1805, located on 17th floor, in block 'B2', admeasuring a super area of 1737.32 sq.ft. Thereafter, vide addendum to apartment buyer's agreement dated 18.04.2011, the respondent changed the allotted apartment from 'B2-1805' to 'A-804' on account of change in layout plan because of which the earlier unit was no more a part of the sanctioned plans. Accordingly, a new unit bearing no. 'A-804', on 8th floor, in block 'A', admeasuring super area of 1733.40 sq. ft. was allotted to the first buyer namely Sh. Rajesh Sachdeva.

5. Later, believing the false assurances and misleading representations of the respondent in its advertisements and brochure and relying upon the goodwill of the respondent company, on 04.05.2011, the complainant purchased the aforesaid residential unit from the said first buyer namely Sh. Rajesh Sachdeva by paying a considerable amount including all the payments which were made by him to the respondent company against the unit. Accordingly, the unit in question was transferred

in the name of complainant. Thereafter, the respondent made an endorsement in the apartment buyer's agreement dated 15.05.2009 in favour of the complainant. Accordingly, the complainant herein is the subsequent allotee of flat bearing no. A-804 as earlier it was in the name of first buyers. After making substantial payment to the original allottees. The respondent endorsed the apartment buyer's agreement dated 15.05.2009 in favour of the complainant and further endorsed all the payment receipts in his favour which were earlier issued in favour of the earlier allottee.

6. The complainant has paid a total sum of Rs. 59,55,678/- towards the aforesaid residential unit in the project till date as and when demanded by the respondent, as against a total sale consideration of Rs. 57,29,522/-. As per clause 10.1 r/w clause 10.2 of the said apartment buyer's agreement dated 15.05.2009, the respondent proposed to complete construction, apply and obtain occupation certificate from the competent authority and handover the possession of the unit in question within a period of 3 years from the date of execution of said agreement, i.e. by 15.05.2012. However, the respondent miserably failed in completing the construction of the project, obtaining occupation certificate and handing over possession of the allotted unit in accordance with the said agreement.

7. Though the booking was made in 2008 and possession was supposed to be handed over in 2012 as per agreement, till the due date as per agreement, i.e. 15.05.2012, the project was nowhere nearing completion. Later, in mid-2013, almost one year after lapse

of due date of handing over possession, the complainant asked the respondent as to the date of handing over, but to no avail as no concrete reply was given by the said respondent. Thereafter, the complainant kept contacting the respondent on several occasions by way of calls as well as personal visits, seeking an update on the construction status and if the requisite sanctions and approvals had been obtained but all in vain.

8. The complainant had asked the respondent to clarify about the one-sided and unfair clauses in the agreement, namely stark contrast between the interest being charged by the respondent @18% on the delayed payments and the delayed possession charges @Rs. 5/- per sq. ft of the super area for which the complainant was entitled on account of delay in handing over possession in violation of the apartment buyer agreement, to which the latter verbally replied that the delayed payment interest, if any, will be charged on the basis of the agreement and the delay in handing over possession of the flat was beyond the control of respondent.

9. After a delay of more than 4 years from the due date of possession, finally on 24.08.2016, the respondent sent a letter of offer of possession thereby inviting the complainant to take possession by 22.09.2016. Accordingly, on 24.09.2016, the possession was taken by the complainant herein after making final payments due against the unit in question. It is imperative to mention here that at the time of taking possession, the complainant was unjustifiably made to sign a one-sided indemnity cum undertaking without which she was not allowed to take possession. Seeing no other alternative and

after paying almost all of her life savings, she had to sign such unfair undertaking as the respondent was in a dominant position at that time.

10. After taking possession on 24.09.2016, the complainant requested the respondent to arrange the registration of conveyance deed in her favour and sought a probable date for it. However, the respondent falsely assured the complainant that it has initiated the registration process which shall be carried forward in a phase wise manner and unit in which handover was done prior in time will be registered first followed by other units. However, post that, no intimation was made by the respondent for execution of conveyance deed. Since the taking over of possession in 2016 till date, the complainant has been painstakingly pursuing the respondent to register the conveyance deed for the unit in question in her favour, but all in vain.

11. The aforesaid conduct of the respondent in delaying the registration of conveyance deed further despite itself undertaking to get the registration done soon was quite suspicious considering the fact that the conveyance deed of residents of other towers in the project in question were already being done. Upon further inquiries from other buyers of the project in question in order to find out the exact reason behind the evasive attitude of the respondent company regarding registration of conveyance deed, the complainant was shocked to know that the respondent failed to obtain the occupation certificate for tower 'A', i.e. the tower where the unit in question is located and tower'C4'. This left the complainant devastated.

12. Thereafter, the complainant immediately rushed to the respondent's office in order to enquire about its aforesaid misconduct and fraudulent acts, to which the representatives of the respondent company simply said that the occupation certificate for the tower in question shall be received soon. The complainant was completely taken aback by the said submission and casual attitude of the respondent. Later, in a meeting held between the residents of tower in question and representatives of the respondent company, Mr. Naveen Bakshi, head of operations, Vatika Limited, promised that the OC for the aforesaid two towers would be obtained before Feb'2020, but again to no avail.

13. That the possession of any residential unit cannot be offered without obtaining the OC from concerned authorities as the said OC is a legal mandate of the fact that the premises is safe in all regards and is fit to be occupied and resided in and is in accordance with the requirements laid down and as per the sanctions approved by the said authorities. Accordingly, the aforementioned offer of possession dated 24.08.2016 is outrightly illegal and elucidates the fraudulent conduct of the respondent.

14. That the fact that the possession was being offered without obtaining occupation certificate was concealed from the complainant at the time of said offer. Rather, when the complainant orally enquired about receipt of all the necessary sanctions for the unit in question, the respondent very clearly submitted that all the approvals are in place. It was only upon conducting an inquiry for the reasons behind non execution of conveyance deed that the complainant came to know about this misconduct on the part of

respondent company. She also made a written representation on 13.06.2020 being signed by her and other allottees followed by a reminder dated 21.06.2020 but without any positive response. Even a number of emails sent in this regard did not produce the desired results.

15. That by concealing the fact of non-receipt of OC from the complainant, the respondent has inflicted great injustice upon the complainant and defrauded them by duping them of their hard-earned money. Further, the clauses of the apartment buyer's agreement dated 15.05.2009 are such that even if the fact of non-receipt of OC was in the knowledge of the complainant at the time of offer of possession, after spending almost all of her life savings, she would have been left with no option but to abide by the assertions of respondent. This can be highlighted from clause 10.3 of the agreement which clearly states that on failure of buyer to take possession, unit could be cancelled by the respondent and holding charges can also be levied.

16. That the fact of concealing the non-receipt of OC and offering possession without OC is not only a violation of the apartment buyer's agreement dated 15.05.2009 but is also a violation of section 11(4)(b) of The Real Estate (Regulation and Development) Act, 2016. Accordingly, the respondent company must be penalized under section 61 to the extent of 5% of the project cost on account of violation of section 11(4)(b) of the said Act.

17. That the respondent had made representations and tall claims that the project will be completed on time and will be handed over after all the necessary permissions and approvals are in place. On the

contrary, the respondent has failed in adhering to the representations made by him and retained the hard-earned money paid by the complainant for so many years thereby causing wrongful loss to the complainant and wrongful gain to the respondent.

18. That the complainant was further agonized when she came to know that she cannot get their apartment insured against natural calamities or other disasters because the insurance companies do not offer insurance coverage to such buildings which are inhabited without having obtained the OC.

19. That as per clause 14.2 of the agreement dated 15.05.2009, the maintenance deposit taken by the respondent from the complainant was interest bearing maintenance security deposit, i.e. IBMS. However, the respondent failed in paying the interest accrued on said deposit to the complainant, despite several intimations from the complainant. Moreover, in the statement of account annexed with the complaint, respondent unjustifiably changed maintenance deposit from 'IBMS' to 'IFMS'.

20. That to add to the misery of the complainant, due to lapse on part of respondent in not obtaining the occupation certificate, the registration of conveyance deed has not been done till date. Accordingly, the respondent must be directed to remove all the irregularities in the project and get the occupation certificate for the tower in question and post that, to register the conveyance deed in favour of the complainant, in accordance with section 17 of the Act, 2016 which clearly states that the conveyance deed in favour of the allottee shall be carried out by the promoter within three months from the date of issue of occupation certificate.

21. That the present complaint has been filed in order to seek a direction to the respondent to obtain the occupation certificate and to get the registration of conveyance deed in favour of the complainant along with interest on the payment by them apart from the other reliefs as mentioned in the relief clause of the complaint. It is pertinent to mention here that the offer of possession dated 24.08.2016 made by the respondent was completely illegal and sans any legal sanctity and accordingly, it must be declared null and void and the complainant must be granted interest at the prescribed rate in accordance with RERA, 2016 and HRERA, 2017 from the due date of handing over possession as per the agreement, i.e. 15.05.2012 till the date of receipt of occupation certificate and offer of legal possession post that.

C. Relief sought by the complainant:

22. The complainant has sought following relief(s):

i. Direct the respondent to obtain occupation certificate for tower 'A' and issue fresh offer of possession letter to the complainant.

ii. Direct the respondent to register the conveyance deed and transfer title in favour of the complainant upon receipt of occupation certificate, in accordance with section 17 of RERA,2016.

iii. Award delay interest at the prescribed rate for every month of delay, from the due date of handing over possession, i.e., 15.05.2012 till offer of valid possession after receipt of occupation certificate.

iv. Direct the respondent to get the towers for which OC has not been obtained to be registered with the hon'ble authority.

v. Direct the respondent to pay interest charges on account of IBMS amount paid by the complainant.

D. Reply by respondent

i. That at the very outset, it is stated that the instant complaint has been preferred by the complainant on frivolous and unsustainable grounds and the complainant has not approached this learned authority with clean hands. The complainant has not approached this learned authority with clean hands. The instant complaint is not maintainable in the eyes of law and is devoid of merit and is fit to be dismissed *in limine*.

ii. That the present complaint is an abuse of the process of this hon'ble authority and is not maintainable. The complainant is trying to suppress material facts relevant to the matter. The complainant is making false, misleading, frivolous, baseless, unsubstantiated allegations against the respondent with malicious intent and sole purpose of extracting unlawful gains from the respondent.

iii. That it is submitted that the complainant voluntarily with free will and consent has taken over the possession of the unit on 24.09.2016 after satisfying with all the terms and conditions of the handing over of possession letter dated 24.09.2016. The respondent humbly submits that the complainant executed the unit handover letter dated 24.09.2016 whereby she took over peaceful and vacant physical possession of the unit in question

after fully satisfying themselves with regard to its measurements, location, dimension, approvals and development etc. It was further explicitly stated by the complainant in the aforesaid letter that upon acceptance of possession, she would not be entitled to raise any claim of any nature whatsoever regarding any variation in the size, dimension, area, location or legal status, delay in possession of the unit in question. The respondent relying upon the aforesaid representation had changed its position to its detriment and proceeded to deliver possession of the unit in question. Therefore, the instant complaint is barred by the principle of estoppel. It is worthwhile to mention here that the complainant took the possession voluntarily with free will and post giving aforesaid representation, hence, the present complaint is not maintainable as she is enjoying the peaceful possession of her apartment since 2016. The complainant has waived off her right to claim the delay interest charges way back in 2016 and therefore, the present complaint is nothing but just an afterthought of the complainant to harass the respondent. It is not out of the place to mention here that as per doctrine of waiver *"a party for whom certain statutory rights are granted, such party can waive those rights if no public interest is involved."* In the present complaint also, the complainant has waived off her rights to claim interest for delay in handing over of possession. Hence, the present complaint is infructuous as the complainant has already waived off her right and concealed the same in the present complaint.

iv. That the present complaint is filed with the oblique motive of harassing the respondent company and to extort illegitimate money while making absolutely false and baseless allegations against the respondent. It is brought to the knowledge of the hon'ble authority that the complainant is guilty of pleading untrue facts.

v. The complainant relied upon various e-mails conversation as annexed with the complaint and are not supported by any affidavit/certificate under section 65 (B) of Evidence Act. Hence, the e-mails placed on record by the complainant has no authenticity, being invalid and are not admissible documents.

23. Copies of all the relevant documents have been filed and placed on record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submissions made by the parties.

E. Jurisdiction of the authority:

E. I Subject matter jurisdiction

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

Section 11(4)(a)

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

Section 34-Functions of the Authority:

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

24. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoters leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent

F.I Objection regarding the handover the possession to the complainant and voluntarily acceptance by the complainant.

25. The respondent has submitted that the complainant voluntarily with free will and consent has taken the possession of the apartment on 24.09.2016 after satisfying all the terms and conditions of the hand over possession letter dated 24.09.2016. The respondent further stated that the complainant executed the apartment handover letter dated 24.09.2016 whereby she took over peaceful and vacant. The respondent has further stated that the respondent company updated the status of the project and occupation certificate to the complainant and who wilfully took over the possession of the unit. It is pertinent to mention here section 11(4)(b) of the Act of 2016 which provides as under.

> ***Section 11(4)(b)***
> *be responsible to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be;*

From the perusal of the above-mentioned provision of the Act of 2016, it is clear that it is the obligation and duty of the promoter to obtain the occupancy certificate from the competent authority and

make it available to the allottee. It is clear from the respondent's contentions that offered the possession of the unit without obtaining the OC which is a mandatory requirement under the Haryana Building Code 2017. Further as discussed above, section 11(4)(b) of the Act of 2016 also confers an obligation on the promoter in this regard. Therefore, the respondent-promoter is in contravention of his obligation under section 11(4)(b) of the Act, 2016.

G. Findings regarding relief sought by the complainant:

Relief sought by the complainant:

G.I Award delay interest at the prescribed rate for every month of delay, from the due date of handing over possession, i.e., 15.05.2012 till offer of valid possession after receipt of OC.

26. In the present complaint, the complainant intends to continue with the project and is seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec.18(1) proviso reads as under.

> *"Section 18: - Return of amount and compensation*
>
> *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."*

27. Clause 10.1 of the apartment, provides for handing over possession and the same is reproduced below:

> ***10.1. Schedule for possession of the said apartment***
>
> *The company base don its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of three years from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in clauses (11.1),(11.2),(11.3) and*

Clause (39) 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 III 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 of the terms or conditions of this Agreement.

28. An apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builder/promoter and buyer/allottee are protected candidly. Apartment buyer's agreement lays down the terms that govern the sale of different kinds of properties like residentials, commercials etc. between the buyer and builder. It is in the interest of both the parties to have a well-drafted agreement which would thereby protect the rights of both the builder and buyer in the unfortunate event of a dispute that may arise. It should be drafted in the simple and unambiguous language which may be understood by a common man with an ordinary educational background. It should contain a provision with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit.

29. The authority has gone through the possession clause of the agreement and observes that the possession has been subjected to all kinds of terms and conditions of this agreement. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single situation may make the possession clause irrelevant for the purpose of allottee and the committed date for handing over possession loses its meaning. If the said possession clause is read in entirety, the time period of

handing over possession is only a tentative period for completion of the construction of the flat in question and the promoter is aiming to extend this time period indefinitely on one eventuality or the other. Moreover, the said clause is an inclusive clause wherein the numerous approvals and terms and conditions have been mentioned for commencement of construction and the said approvals are sole liability of the promoter for which allottee cannot be allowed to suffer. The promoter must have mentioned that completion of which approval forms a part of the last statutory approval, of which the due date of possession is subjected to. It is quite clear that the possession clause is drafted in such a manner that it creates confusion in the mind of a person of normal prudence who reads it. The authority is of the view that it is a wrong trend followed by the promoter from long ago and it is their unethical behaviour and dominant position that needs to be struck down. It is settled proposition of law that one cannot get the advantage of his own fault. The incorporation of such clause in the apartment 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.

30. **Admissibility of delay possession charges at prescribed rate of interest**: The complainant is seeking delay possession charges, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over

of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.: Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.*

31. The legislature in its wisdom in the subordinate legislation under the provision of rule 15 of the rules, has determined the prescribed rate of interest. The rate of interest so determined by the legislature, is reasonable and if the said rule is followed to award the interest, it will ensure uniform practice in all the cases.
32. 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., 12.04.2022 is 7.30% p.a. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e.,9.30% p.a.
33. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default. The relevant section is reproduced below:

> *"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.*

Explanation. —For the purpose of this clause—

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;"

34. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% p.a. by the respondent/promoter which is the same as is being granted to the complainant in case of delay possession charges.

35. **Validity of offer of possession:** At this stage, the authority will clarify the concept of 'valid offer of possession'. It is necessary to clarify this concept because after valid and lawful offer of possession, liability of promoter for delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, liability of promoter continues till a valid offer is made and allottee remains entitled to receive interest for the delay caused in handing over valid possession. The authority after detailed consideration of the matter has arrived at the conclusion that a valid offer of possession must have following components:

i. **Possession must be offered after obtaining occupation certificate-** The subject unit after its completion should have received occupation certificate from the concerned department certifying that all the basic infrastructural facilities have been laid and are operational. Such

infrastructural facilities include water supply, sewerage system, storm water drainage, electricity supply, roads and street lighting.

ii. **The subject unit should be inhabitable condition-** The test of habitability is that the allottee should be able to live in the subject unit within 30 days of the offer of possession after carrying out basic cleaning works and getting electricity, water and sewer connections, etc from the relevant authorities. In a habitable unit, all the common facilities like lifts, stairs, lobbies, etc should be functional or capable of being made functional within 30 days after completing prescribed formalities. The authority is further of the view that minor defects like little gaps in the windows or minor cracks in some of the tiles, or chipping plaster or chipping paint at some places or improper functioning of drawers of kitchen or cupboards etc. are minor defects which do not render an apartment uninhabitable. Such minor defects can be rectified later at the cost of the developers. The allottee should accept possession of an apartment with such minor defects under protest. This authority will award suitable relief or compensation for rectification of minor defects after taking over of possession under protest.

However, if the subject unit is not at all habitable because the plastering work is yet to be done, flooring works is yet to be done, common services like lift etc. are non-operational, infrastructural facilities are non-operational, then the subject unit shall be deemed as uninhabitable and offer of possession

of an uninhabitable unit will not be considered a legally valid offer of possession.

iii. **Possession should not be accompanied by unreasonable additional demands-** In several cases, additional demands are made and sent along with the offer of possession. Such additional demands could be of minor nature or they could be significant and unreasonable which puts heavy burden upon the allottee. An offer accompanied with unreasonable demands beyond the scope of provisions of agreement should be termed an invalid offer of possession. Unreasonable demands itself would make an offer unsustainable in the eyes of law. The authority is of the view that if the additional demands are made by the developer, the allottee may accept possession under protest or decline to take possession raising objection against unjustified demands.

36. Though in the light of the above-mentioned fact the offer of possession made on 24.08.2016, by the promoter to the allottee is not valid, the same being made without obtaining occupation certificate but the allottee has already taken possession on the basis of offer of possession on 24.09.2016 and is continuing as such and enjoying the property. She is certainly entitled to delay possession charges but only from the due date 15.05.2012 upto 24.09.2016, the date on which possession of the allotted unit was taken on the basis of offer of possession 24.08.2016.

37. On consideration of the record and submissions made by the parties, 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 apartment buyer's agreement executed between the parties on 15.05.2009, the possession of the booked unit was to be delivered within 3 years from the date of execution of agreement and the due date comes out on 15.05.2012. The offer of possession made by the respondent/promoter on 24.08.2016 after a gap of more than 4 years is not a valid/lawful offer of possession due to non-receipt of OC.

38. The respondent sent a letter of offer of possession on 24.08.2016 inviting the complainant to take possession. Accordingly, on 24.09.2016 the possession was taken by the complainant herein after making final payments due against unit in question. The complainant has also stated that she had taken an assurance from the respondent for obtaining OC and was kept in dark. The matter is being referred to director town and country planning Haryana, Chandigarh. There is violation of Haryana Building Code, as the builder has offered possession without obtaining OC. The director may initiate legal proceedings against the promoter. The DTCP is also advised to dispose of application of the promoter for grant of occupation certificate and after levying the compounding fees as per applicable rules from the promoter-respondent. The complainant has already taken over possession, accordingly from the date he has taken over possession, he cannot be allowed delayed possession charges. Although the possession has been offered wrongly by the respondent as mentioned above. However, the complainant shall be entitled for DPC from the due date of possession till actual taking over the possession.

G.II Direct the respondent to register the conveyance deed and transfer title in favour of the complainant upon receipt of occupation certificate, in accordance with section 17 of RERA,2016.

36. The complainant is asking for the registration of conveyance deed and transfer of title in accordance with section 17 of the Act of 2016. The complainant in the present complaint has taken possession of the unit on 24.09.2016 on offer of the possession of the unit in question. Whereas the possession was offered by the respondent/promoter without obtaining the OC. the respondent/promoter clearly violated the section 11(4)(b) of the Act, 2016 as detailed in this order therefore, the respondent/promoter is under a mandatory obligation as per the statue and as per the BBA signed between the mutual of consent of both parties for registration of conveyance deed after obtaining OC.

37. Clause 13 is reproduced below:

13. Conveyance of the said Apartment

Clause 13.:

"The Company, its Associates Companies, its Subsidiary Companies as stated earlier shall prepare and execute along with the Allottee a conveyance deed to convey the title of the Said Apartment in favour of Allottee but only after receiving full payment of the total price of the Apartment and the parking space allotted to him/her and payment of all securities including maintenance security deposits and charges for bulk supply of electrical energy, interest, penal interest etc. on delayed instalments stamp duty, registration charges, incidental expenses for registration, legal expenses for registration and all other dues as set forth in this Agreement or as demanded by the Company from time to time prior to the execution of the Conveyance Deed. If the Allottee is in default of any of the payments as set forth in this Agreement then the Allottee authorizes the Company to withhold registration of the Conveyance Deed in his/her favour till full and final settlement of all dues to the Company is made by the Allottee and agrees to bear the consequences. The Allottee undertakes to execute Conveyance Deed within the time stipulated by the Company in its written notice failing which the Allottee authorizes the Company to cancel the allotment and terminate this Agreement in terms of Clause (12) of

this Agreement and to forfeit out of the amounts paid by him/her the earnest money, delayed payment of interest any interest paid, due or payable, any other amount of a non-refundable nature and to refund the balance amount without any interest in the manner prescribed in Clause (12) Supra. The Allottee shall be solely responsible and liable for compliance of the provisions of Indian Stamp Act 1899 including any actions taken or deficiencies/penalties imposed by the competent authority(ies). Any increase/decrease in the Stamp Duty charges during the period when the case for execution of the Conveyance Deed of the allotted flat is being processed by the Company Shall be borne by/refunded to the Allottee.

38. It should be further noted that Section 11(4)(f) provides for the obligation of respondent/promoter to execute a registered conveyance deed of the apartment along with the undivided proportionate title in common areas to the association of the allottees or competent authority as the case may be as provided under section 17 of the Act of 2016. As envisaged in the below mentioned section the respondent/promoter is in clear contravention of section 11(4)(f) of the Act of 2016 and shall get the conveyance deed done after obtaining OC.

39. As far as the relief of transfer of title is concerned the same can be clearly said to be the statutory right of the allottee as section 17(1) of the Act provide for transfer of title is reproduced below:

"Section 17: - Transfer of title.—

17(1). The promoter shall execute a registered conveyance deed in favour of the allottee along with the undivided proportionate title in the common areas to the association of the allottees or the competent authority, as the case may be, and hand over the physical possession of the plot, apartment of building, as the case may be, to the allottees and the common areas to the association of the allottees or the competent authority, as the case may be, in a real estate project, and the other title documents pertaining thereto within specified period as per sanctioned plans as provided under the local laws: Provided that, in the absence of any local law, conveyance

deed in favour of the allottee or the association of the allottees or the competent authority, as the case may be, under this section shall be carried out by the promoter within three months from date of issue of occupancy certificate.

40. Hence, in compliance of the above-mentioned provision of the Act of the 2016 the respondent/promoter shall transfer the title to the association of the allottee within 3 months from the date of issuance of occupation certificate.

G. IV. Direct the respondent to pay interest charges on account of IBMS amount paid by the complainant.

41. A perusal of the statement of account show that the complainant has already paid a sum of Rs. 86,750/- as IBMS with the respondent/builder besides other charges. The relevant clause with regard to interest bearing maintenance security is reproduced below:

14.2. Interest Bearing Maintenance Security Deposit

In order to secure due performance of the Allottee in paying promptly the maintenance bills and other charges as raised by the maintenance agency/company, the Allottee agrees to deposit as per the schedule of payment given in Annexure III and to always keep deposited with the Company/Maintenance Company an interest-bearing maintenance security deposit calculated at the rate of Rs.50/- per sq.ft. of the super area of the said Apartment. In case of failure of the Allottee to pay the maintenance bills, other charges on or before the due date, the Allottee in addition to permitting the Company/Maintenance Company to deny him/her the right to avail the maintenance services also authorizes the Company to adjust maintenance security deposit against such defaults. If due to such adjustment, the interest-bearing maintenance security deposit falls below the agreed sum of Rs. 50/- sq.ft. of the super area of the said Apartment, then the Allottee hereby undertakes to make good the resultant shortfall within fifteen days of demand by the Company. Such maintenance security deposit share bear simple interest at the rate as applicable from time to time on a fixed deposit in State Bank of India for a period of one year, which shall be used by the Company to subsidise the monthly maintenance charges. The Company/Maintenance Company reserves the right to increase the

interest-bearing maintenance security from time to time in keeping with the increase in the cost of maintenance services and the Allottee agrees to pay such increases within fifteen (15) days of demand by the Company. If the Allottee fails to pay such increase in the Interest Bearing Maintenance Security Deposit or to make good the shortfall as aforesaid on or before its due date, then the Allottee authorizes the Company to charge interest at the rate of @18% for the period of such delay and to stop/disconnect all maintenance services to the said Apartment till such sums due along with interest as stipulated hereinabove are paid by the Allottee. It is made specifically clear, and it is so agreed by and between the parties hereto that this part of the Agreement relating to interest bearing maintenance security deposit as stipulated in this clause shall survive the conveyance of title in favour of Allottee and the Company shall have first charge/lien on the said Apartment in respect of any such non-payment of shortfall/increases as the case may be.

As the amount of IBMS has been already collected by the respondent/builder but the builder has miserably failed to obtain the occupation certificate and completion certificate which is an mandatory requirement for the statutory approval of habitation and services. It is pertinent to mention here clause 17(2) of the Act of 2016 is reproduced below:

***17(2)** After obtaining the occupancy certificate and handing over physical possession to the allottees in terms of sub-section (1), it shall be the responsibility of the promoter to handover the necessary documents and plan, including common areas, to the association of the allottees or the competent authority, as the case may be, as per the local laws:*

Provided that, in the absence of any local law, the promoter shall handover the necessary documents and plans, including common areas, to the association of the allottees or the competent authority, as the case may be, within thirty days after obtaining the [completion] certificate.

From the understanding of the abovementioned clause, it is understood that the respondent/promoter after obtaining the occupation certificate and handing over the physical possession to the allottees under sub-section 1 has to handover necessary documents and plans including common areas to the association of

the allottees within 30 days after obtaining the completion certificate. There is nothing on the record to show that any resident welfare association has been formed. Moreover, in the absence of occupation certificate, the builder cannot validly transfer the ownership of common areas to the resident welfare association and the amount collected as IBMS. However, as an when occupation certificate of the tower is received, then within three months, the respondent/builder is obligated to transfer the amount of IBMS collected from the allottees along with interest as per laws.

H. Directions of the authority:

42. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligation cast upon the promoters as per the function entrusted to the authority under section 34(f) of the Act of 2016:

i. The complainant shall be entitled for delay possession charges from the due date of possession i.e., 15.05.2012 till actual taking over the possession i.e.,24.09.2016.

ii. As and when OC of the tower of the allotted unit is received by the respondent/builder, then it will be obligated for him to arrange execution of conveyance deed of the unit in favour of the complainant on her depositing necessary charges within 3 months and falling which legal consequences would follow.

iii. The respondent/builder is also directed to transfer the amount of IBMS besides interest accrued thereon upto date in favour of resident's welfare associations within 3 months of the receipt of OC of the tower of the allotted unit.

iv. A direction is given to the respondent/builder to obtain occupation certificate of the project from the competent authority by completing all the formalities within a period of 3 months.

43. Complaint stands disposed of.

44. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.04.2022