BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**4666 of 2020**
Date of filing complaint:		**22.12.2020**
First date of hearing	**:**	**11.02.2021**
Date of decision	**:**	**12.04.2022**

Sh. Krishna Singh
R/o: C4-103, Vatika Gurgaon 21, G21 Avenue, Vatika India Next, Sector-83, Gurugram-122004 **Complainant**

Versus

M/s Vatika Limited
Office Address : Vatika Triangle, 4th floor, Sushant Lok, Phase-I, Block A, Mehrauli Gurgaon Road, Gurugram-122002, Haryana. **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.	Allotment letter dated	**14.10.2011 (page 37 of complaint)**
8.	Date of execution of apartment buyer's agreement	08.12.2011 (page 38 of complaint)
9.	Unit no.	Ggn Nxt-C4/103, 1st floor, block C4 (page 41 of complaint)
10.	Unit measuring (super area)	2337.18 sq. ft.
11.	Agreement to sell	18.06.2018 (page 91 of complaint)
12.	Unit transfer from the original to complainants vide endorsement dated	14.11.2018 (page 85 of complaint)
13.	Payment plan	Construction linked payment plan (page 70 of complaint)
14.	Total sale consideration	Rs. 74,99,256/-

		(as per statement of account dated 03.11.2020 at page 101, annexure P/7 of complaint)
15.	Total amount paid by the complainant	Rs. 83,28,531/- (as per statement of account dated 03.11.2020 at page 101, annexure P/7 of complaint)
16.	Due date of delivery of possession ***Clause 10.1: SCHEDULE FOR POSSESSION OF THE SAID APARMENT:*** *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.***	**08.12.2014**
17.	Intimation of possession	08.04.2016 (page 86 of complaint)
18.	Handing over the possession	01.09.2016 (page 90 of complaint)
19.	Occupation Certificate	Not obtained

B. Facts of the complaint:

3. That somewhere around 2009-2012, the respondent advertised about its new residential group housing project namely "Gurgaon 21" (***hereinafter called as 'the project'***) located in Vatika India Next, Sector-83, Gurugram. The respondent painted a rosy picture of the project in their 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. That relying on the abovesaid representations of the respondent company, on 03.09.2011, the erstwhile owners/first buyers namely Smt. Bimla Malhotra and Sh. Deepak Malhotra booked an apartment in the said project by paying the booking amount of Rs. 30,50,000/- vide RTGS towards the said apartment. Accordingly, an allotment letter dated 14.10.2011 was issued and an apartment buyers agreement dated 08.12.2011 was executed between the said erstwhile owners and the respondent for unit bearing no. C4-103, located on 1st floor, in block 'C4', (hereinafter called as "the unit") admeasuring a super area of 1776.77 sq. ft.

5. That as per clause 10.1 read with clause 10.2 of the said apartment buyer's agreement dated 08.12.2011, the respondent proposed to complete construction, apply and obtain occupation certificate 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 08.12.2014. However, the respondent miserably failed in handing over possession in accordance with the said agreement.

6. That though the booking was made in 2011 and the project was launched somewhere around 2009-2010, till the due date as per agreement, i.e. 08.12.2014, the unit was not ready for possession in accordance with the specifications as per the agreement. However, the erstwhile owners/first buyers kept making payment in accordance with the demands raised by the respondent.

7. That thereafter, on 08.04.2016, the respondent sent a letter of intimation of possession followed by a letter of offer of possession.

Accordingly, on 01.09.2016, the possession was taken by the first buyers (through their authorized special power of attorney holder Mr. Rakesh Malhotra) after making final payments due against the unit in question.

8. 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 18.06.2018, the complainant purchased the aforesaid residential flat/unit from the said first buyers by executing an agreement to sell with them. Accordingly, the unit in question was transferred in the name of complainant vide assignment form dated 02.11.2018 and a welcome letter dated 14.11.2018 was issued by the respondent company in favour of the complainant. It is pertinent to mention here that at the time of purchase by the complainant, the area of the unit in question was 1785 sq. ft. as against the area of 1776.77 sq. ft. as per the agreement.

9. That thereafter, on 14.11.2018, the respondent made an endorsement in the apartment buyer's agreement dated 08.12.2011 in favour of the complainant. Accordingly, the complainant herein is the subsequent allottee of flat bearing no. C4-103 as earlier it was in the name of first buyers. The complainant after making substantial payment to the original allottees stepped into the shoes of original allottees. The respondent endorsed the apartment buyer's agreement dated 08.12.2011 in favour of the complainant and further endorsed all the payment receipts in favour of the complainant which were earlier issued in favour of the earlier allottees.

10. That a total payment of Rs. 83,28,531.93/- has been made towards the aforesaid residential unit/flat in the project till date as and when demanded by the respondent, as against a total sale consideration of Rs. 74,99,256.30/- . The said payments were duly endorsed by the respondent in favour of the complainant.

11. That after taking possession, by way of calls and meetings with the representatives of the respondent company, on several occasions, the complainant requested the respondent to arrange the registry of conveyance deed in her favour and sought a probable date for registration. To this, the respondent falsely assured the complainant that they have 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 inviting the complainant for execution of conveyance deed.

12. That at the time of purchasing the unit in question, the complainant was assured by the respondent that the project and the unit is complete in all regard and all the legal approvals and sanctions are in place and the conveyance deed shall be executed soon in their favour. Since the taking over of possession 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.

13. That the aforesaid conduct of the respondent in delaying the registration of conveyance deed further despite themselves 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 (hereinafter called as "OC") for Tower C4', i.e. the tower where the unit in question is located and Tower 'A'. This left the complainant devastated.

14. That thereafter, the complainant immediately rushed to the respondent's office in order to enquire about the aforesaid misconduct and fraudulent act of theirs, 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.

15. That the fact that the unit in question was without an occupation certificate was concealed from the complainant at the time of said purchase. 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.

16. That upon gaining knowledge about the non-receipt of OC, the complainant along with other buyers of the tower in question kept pursuing the respondent in order to seek an explanation over non-receipt of OC and to protest against concealment of said fact at the time of offer of possession. Subsequently, misrepresentation made by respondent to the complainant at the time of purchase by the latter) and to be acquainted with a tentative date for receipt of OC, but to no avail. The complainant sought a concrete response by way of letter dated 13.06.2020 which was signed by other buyers as well, but the respondent refused to pay any heed to the same.

17. 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 08.12.2011 are such that even if the fact of non-receipt of OC was in the knowledge of the first buyers at the time of offer of possession, after spending almost all of their life savings, they 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.

18. That the main rationale behind issuance of an occupation certificate is that such certificate is an assurance of the fact that the building has been constructed according to permissible laws and

all the local laws have been complied with and accordingly, the said building is fit to occupy. Further, it is only upon receipt of occupation certificate that the building becomes safe in all respects to reside and becomes a marketable property as well. Accordingly, by offering possession of a unit which is not fit to occupy, the respondent has not only duped the complainant of her hard-earned money and defrauded them but has risked the lives of the residents of such unit and eventually, the entire tower/building, which amounts to a serious misconduct on part of respondent which made tall claims and representations at the time of purchase of said unit and in their advertisements as well.

19. 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 08.12.2011 but is also a violation of Section 11(4)(b) of the 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.

20. That the main rationale of the respondent behind offering possession hurriedly without obtaining the occupation certificate was to shorten the period of delay and eventually to minimize the delayed possession charges that the said respondent may be made liable for on account of delay in offering and handing over possession. The complainant did not even imagine that the respondent was planning to offer the possession of a residential apartment which had still not received the OC, which was, and still is, a pre-requisite for a safe living. That the respondent company is an experienced company in the business of making residential

apartments, this deliberate act of cheating its customers and at the same time, committing a gross misconduct of non-compliance of rules is nothing short of criminal.

21. That the complainant was further agonized when she came to know that she cannot get her 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. Non-availability of any safety of insurance cover has robbed the complainant and her family of their peace of mind and they live under constant fear. Multiple instances of earthquakes in recent months have shaken the complainant.

22. That the respondent simply duped the complainant of her hard-earned money and life savings. Further, the complainant and her family are living in the unit in question at the risk of their lives, considering the unit has not been declared fit for occupation by the concerned authorities and may lack requisite safety approvals as well. The aforesaid arbitrary and unlawful acts on the part of respondent have resulted into extreme kind of financial hardship, mental distress, pain and agony to the complainant.

23. 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.

24. That the non-execution of conveyance deed is not only a violation of section 17 of the Real Estate (Regulation and Development) Act, 2016 but is also a violation of clause 13 of the apartment buyer agreement dated 08.12.2011 which clearly stipulates that upon full and final payment by the complainant, the respondent will be under an obligation to register the conveyance deed in favour of the allottee.

25. That post the purchase and subsequent endorsement in the agreement in favour of the complainant, she stepped into the shoes of the first buyers and vide clause 34 of the apartment buyers agreement dated 08.12.20211, the provisions of the said agreement are applicable on the subsequent purchasers. Accordingly, the complainant herein is entitled to delayed possession charges on account of delay in offering valid possession from the due date of possession as per the agreement till the valid offer of possession.

26. 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 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. 08.12.2014 till the date of receipt of occupation certificate and offer of legal possession post that.

27. That as per **Section 11(4)(a)** of the Real Estate (Regulation and Development) Act, 2016, the promoter is liable to pay delayed possession interest to the allottees of an apartment, building or project for a delay or failure in handing over of such possession as per the terms and agreement of the sale.

C. Relief sought by the complainant:

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

i. Direct the respondent to obtain occupation certificate for tower 'C4' and issue fresh offer of possession letter to the complainants.

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

iii. Direct the respondent to pay delay interest at the prescribed rate for every month of delay, from the due date of handing over possession, i.e. 08.12.2014 till offer of valid possession after receipt of occupation certificate.

iv. Impose a penalty upon the respondent to the extent of up to 5% of the total cost of the project for violation of Section 11(4)(b) of RERA, 2016.

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

D. Reply by respondent

i. That the present complaint, filed by the complainants, is bundle of lies and hence liable to be dismissed as it is filed without cause of action.

ii. That the present complaint is an abuse of the process of this hon'ble authority and is not maintainable. The complainants are trying to suppress material facts relevant to the matter. The complainants are 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 erstwhile buyers/first owners have made several visits to the office of the Respondent to know the whereabouts of the project titled ***"Gurgaon-21"*** [hereinafter referred to as ***'Project'***] located at Vatika India Next, Sector-83, Gurgaon, Haryana. That the erstwhile buyers/ first owners have enquired about the veracity of the subject project of respondent and satisfied with every approvals which are deemed necessary for the purpose of development of the subject project of the respondent. It is pertinent to note that the erstwhile buyers/first owners had immense and deep interest in the subject project of respondent and thereby booked an apartment on 03.09.2011.

iv. That the respondent issued an allotment letter in regard to the apartment bearing No. 103, 1st floor, block-C4 located in Gurgaon 21, Vatika India Next, Sector 83, Gurgaon, Haryana admeasuring super area 1776.77 sq. ft. [hereinafter referred

to as the ***'Allotted unit'***] in favour of the erstwhile buyers/first owners on 14.10.2011 vide Ref. No. Ggn21/C4-103.

v. That the apartment buyer agreement [hereinafter referred to as *'ABA'*] was executed in between the erstwhile buyers/ first owners and the respondent on 08.12.2011 in regard to the allotted unit of the erstwhile buyers/ first owners. That it is submitted that clause 10.1 of the ABA clearly states that the schedule period of handing over of possession would be within a period of 3 years from the date of execution of ABA.

vi. That it is submitted that the respondent has conveyed the information to the erstwhile buyers/first owners that the respondent has faced some unforeseen circumstances due to which the schedule of development of the subject project got affected and some delay in the completion of the project has been caused. That it is pertinent to note that the erstwhile buyers/ first owners did not raise any form of objections pertaining to delay in delivery of possession considering the unforeseen circumstances.

vii. That the respondent being a responsible developer has issued the letter of intimation of possession and offer letter of possession in regard to the allotted unit of the erstwhile buyers/ first owners on 08.04.2016. That it is pertinent to note that the erstwhile buyers/ first owners voluntarily under free will and consent have taken over the possession of the allotted unit vide possession handover letter (the same has already been placed on record) which was issued by respondent on 01.09.2016. It is further submitted that the erstwhile buyers/ first owners have taken over peaceful and

vacant physical possession of the allotted unit since 2016 after fully satisfying themselves with regard to its measurements, location, dimension, approvals and development etc. It was further explicitly stated by the erstwhile buyers/ first owners in the aforesaid letter that upon acceptance of possession they 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 apartment in question.

viii. That it is imperative to mention here that the erstwhile buyers/ first owners took the possession voluntarily with free will while agreeing to the aforesaid representation, hence the present complaint is not maintainable as the complainant has stepped into the shoes of the erstwhile buyers/ first owners after the expiry of two years from the date of handing over possession of the apartment in question. It is further submitted that the complainant being the subsequent allottee has waived off the rights to claim the delay interest charges for the delay in handing over of possession. It is apropos to mention that the complainant has purchased the apartment in question from the erstwhile buyers/ first owners after being fully satisfied with all its specifications and details and enjoying the peaceful possession of the apartment in question since 2018. Therefore, the present complaint is nothing but just an afterthought action to harass the respondent and hence the same is barred by the Law of estoppel. 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 erstwhile buyers/first owners had waived off their rights to claim interest for delay in handing over of Occupational Certificate before transferring the said unit to the Complainant. Hence, the present complaint is infructuous as the Complainants have no locus standi or cause of action.

ix. That it is pertinent to note that the respondent was unaware of the agreement that had taken place between the complainant and erstwhile buyers/first owner, neither the respondent was a part of the said agreement. Therefore, the respondent has no liability in regard to the understanding that has taken place between the complainant and erstwhile buyers/first owners. Therefore, based on the representation made by erstwhile buyers/ first owners in the possession handover letter dated 01.09.2016, waiving off the right to claim any form of rights in regard to the apartment in question and therefore, the complainant has no locus standi or valid cause of action to file the present complaint in regard to the apartment in question as the complainant has purchased the apartment in question from erstwhile buyers/first owners after the possession of the apartment in question was handed over by the respondent to the erstwhile buyers/ first owners in 2016.

x. That it is pertinent to mention that the status regarding the occupation certificate and conveyance deed is already being conveyed to the erstwhile buyers/ first owners by respondent. Thereby, being satisfied with the status of OC and

conveyance deed the erstwhile buyers/ first owners have signed the possession handover letter dated 01.09.2016 and have taken over the peaceful possession of the allotted unit. Thereby, the complainant being the subsequent allottee has purchased the apartment in question in 2018 from the erstwhile buyers/ first owners and have no rights to claim the delay interest for the handing over of possession and also for delay interest in obtaining OC since 2016. Therefore, it is submitted that the complainant by raising the issue of occupation certificate, conveyance deed and delay possession charges has clearly reflected a mala-fide intention to harass the respondent and extort wrongful monies. It is further submitted that the respondent is putting every effort to get the occupation certificate as soon as possible and also to execute the conveyance deed in favour of the complainant as the respondent has a bona fide intention and has no intent to defraud with the complainant.

xi. That the complainant bought the apartment from original allottee in the year 2018 after obtaining entire information about the status of the project from him. It is pertinent to mention here that the complainant voluntarily stepped into the shoes of the original allottees 2 years after the delivery of possession of the unit, and the complainants cannot deny this fact that they were well aware about the status of the project and also the fact that the erstwhile buyers/first owners had waived off their rights as far as the said apartment is concerned while accepting the possession.

xii. That the complainant has come before this hon'ble authority with ulterior motive. That the present complaint has been filed by the complainant just to harass the respondent and to gain the unjust enrichment. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainant, a detailed deliberation by leading the evidence and cross-examination is required, thus only the civil court has jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication, if at all the contents of the complaint are taken to be correct and true.

xiii. That the various contentions and claims as raised by the complainants are fictitious, baseless, vague, and wrong and created to misrepresent and mislead this hon'ble authority, for the reasons stated above. That it is further submitted that none of the reliefs as prayed for by the complainants are sustainable before this hon'ble authority and in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and resources of the Hon'ble authority. That the present complaint is an utter abuse of the process of law, and hence deserves to be dismissed.

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 01.09.2016 after satisfying all the terms and conditions of the hand over possession letter dated 01.09.2016. The respondent further stated that the complainant executed the apartment handover letter dated 01.09.2016 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., 08.12.2014 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 08.04.2016, 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 01.09.2016 and is continuing as such and enjoying the property. She is certainly entitled to delay possession charges but only from the due date 08.12.2014 upto 01.09.2016, the date on which possession of the allotted unit was taken on the basis of offer of possession 08.04.2016.

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 08.12.2011, 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 08.12.2014. The offer of possession made by the respondent/promoter on 08.04.2016 after a gap of more than 2 years is not a valid/lawful offer of possession due to non-receipt of OC.

39. The respondent sent a letter of offer of possession on 08.04.2016 inviting the complainant to take possession. Accordingly, on 01.09.2016 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.

40. 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 01.09.2016 on offering 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 other reliefs in this judgement 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 the both parties for registration of conveyance deed after obtaining OC.

41. 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.

42. 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.

43. 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.*

44. 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.

H. Directions of the authority:

45. 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 complainants shall be entitled for delay possession charges from the due date of possession i.e., 08.12.2014 till actual taking over the possession i.e., 01.09.2016.

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. 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.

46. Complaint stands disposed of.

47. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.04.2022