

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

Complaint no.	:	4123 of 2020
Date of filing complaint:		24.11.2020
First date of hearing	:	07.04.2021
Date of decision	:	12.04.2022

Alok Jha & Neeta Jha Both RR/o: C4-204, Gurgaon 21, Vatika India Next, Sector 83, Gurugram-122004	Complainants
Versus	
M/s Vatika Limited R/o: Vatika Triangle, 4 th 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)	Complainants
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the Act or



the rules and regulations made there under or to the allottees 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 complainants, 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	07.01.2013 (page 38A of complaint)
8.	Unit no.	204, 2 nd floor, block C4 (page 42 of complaint)
9.	Unit measuring (super area)	1776.77 sq.ft.
10.	Payment plan	Time linked payment plan (page 86 of complaint)
11.	Total sale consideration	Rs. 1,07,50,207/- (as per statement of account dated 06.01.2021 at page 111, annexure R/4 of reply)
12.	Total amount paid by the complainants	Rs. 1,11,83,859/- (as per statement of account

		dated 06.01.2021 at page 111, annexure R/4 of reply)
13.	Due date of delivery of possession <i>Clause 15 The developer 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 3 years from the date of execution of this agreement unless there shall be delay or there shall be failure due to reasons mentioned in clause 17,18 & 42 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 developer 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.</i>	07.01.2016
14.	Offer of possession	24.01.2017 (annexure R/2, page 45 of reply)
15.	Handing over the possession	31.03.2017 (annexure P/4, page 110 of complaint)
16.	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" 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. That 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 01.12.2012, the complainants booked an apartment in the said project of the respondent company by paying an amount of Rs. 4,99,131/- by way of instrument bearing no. 4,93,154/- dated 01.12.2012 towards said booking. After more than one month from the date of booking, an apartment buyer's agreement was executed on 07.01.2013 between the complainants and the respondent for unit bearing no. C4-204, located on 2nd floor, in tower C4 and admeasuring a super area of 1776.77 sq.ft. for a total sale consideration of Rs. 1,07,50,207/-. Thereafter, the complainants kept making payment in accordance with the demands raised by the respondent. Accordingly, the complainants have paid a total sum of Rs. 1,11,83,859/- towards the aforesaid residential flat in the project till date as and when demanded by the respondent, as against a total sale consideration of Rs. 1,07,50,207/- As per clause 15 of the ABA dated 07.01.2013, the respondent proposed to complete construction 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 07.01.2016. However, the respondent failed in handing over possession in accordance with the said agreement.
5. Though the booking was made in 2012 and project was launched somewhere around 2009, till the due date as per agreement i.e.,

07.01.2016, the unit was not ready for possession in accordance with the specification as per the agreement.

6. The complainants 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 on the delayed payments and the delayed possession charges for which the complainants were 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.
7. While as per clause 12 of the agreement, upon delay in payments, the allottees could be made liable to the extent of paying 18% interest per annum. On the contrary, as per clause 20, upon delay in handing over possession, the respondent company would be liable to pay compensation only to the extent of Rs. 5/- per sq.ft. of the super area of the apartment for the period of delay. It is submitted that such clauses of the agreement are clearly unfair and arbitrary thus making the agreement one-sided. Accordingly, the complainants pointed out these unfair clauses to the respondent, but to no avail.
8. Subsequently, on 24.01.2017, the respondent sent a letter for possession to the complainants informing them about the possession formalities which were to be commenced post that and seeking payment of final instalment due '*at the time of possession*'. The validity of said letter was till 14.02.2017. To this,

the complainants contacted the respondent the respondent to fix the appointment for handover on 16.02.2017. Accordingly, via email dated 06.02,2017, the respondent fixed 16.02.2017 as the date for handing over possession.

9. That to the utter shock of the complainants, when they went to take possession on 16.02.2017, after signing the hand over notes, when they entered their unit, they were startled to see that it was full of innumerable snags and irregularities pointed out the snags to the respondent and asked them to get them repaired and issue a fresh possession later. The respondent assured to the complainants that the defects shall be repaired and invited them to come for taking possession on 04.03.2017. However, when the complainants went to take possession on 04.03.2017. However, when the complainants went to take possession on 04.03.2017, again the work was incomplete. The complainants pointed out to the respondent, The lapses on their part, vide e-mail dated 14.03.2017. Further, vide e-mail dated 07.03.2017, the respondent fixed 26.03.2017 for taking possession and finally, on 31.03.2017, the possession of the unit in question was taken over by the complainants. It is submitted that keeping in view the aforesaid chain of events, email dated 07.03.2017 should be considered as the date of offer of taking possession, the area of the unit was changed from 1776.77 sq.ft. to 1785 sq.ft., for which the complainants paid at the time of possession and the same is reflected in the account statement as well.

10. After taking possession on 31.03.2017, by way of calls and meetings with the representatives of the respondent company, on

several occasions, the complainants 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 complainants 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 complainants 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 complainants were shocked to know that the respondent failed to obtain the occupation certificate for tower 'C4', i.e. the tower where the unit in question is located and tower 'A'. This left the complainants devastated.
12. Thereafter, the complainants 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 complainants were 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 is outrightly illegal and elucidates the fraudulent conduct of the respondent. The complainants already invested almost all of their life savings in order to purchase the unit in question, the complainants had no other option but to believe the representations of the respondent regarding the veracity of offer of possession and take possession. There was no apparent reason for the complainants to even imagine that a company of such size and market reputation that the respondent was at that time, was actually committing an illegal act by offering the possession as it had not obtained the OC and had kept the complainants in complete dark about non-availability of the OC.

14. That the fact that the possession was being offered without obtaining occupation certificate was concealed from the complainants at the time of said offer. Rather, when the complainants 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 complainants came to know about this misconduct on the part of respondent company. Upon gaining knowledge about the non-receipt of OC, the complainants 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 and to be acquainted with a tentative date for receipt of OC, but to no avail. The complainants sought a concrete response by way of letter dated 13.06.2020 followed by reminder letter dated 21.06.2020 which were signed by other buyers as well , but the respondent refused to pay any heed to the same.
15. That by concealing the fact of non-receipt of OC from the complainants, the respondent has inflicted great injustice upon the complainants and defrauded them by duping them of their hard-earned money. Further, the clauses of the apartment buyer's agreement dated 07.01.2013 are such that even if the fact of non-receipt of OC was in the knowledge of the complainants 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 17 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. The main rationale behind issuance of an OC 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 OC 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 complainants of their hard-earned money and defrauded them, but has risked the lives of the residents of such unit and eventually, the entire tower, which amounts to a serious misconduct on part of respondent company which made tall claims and representations not only while booking but even at the time of offer and handing over of possession.
17. 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 07.01.2013 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. The complainants booked the flat with high hopes and dreams that they will be able to live in a safe environment along with their family and will be able to give their family secure and comfortable surroundings to live in. However, the respondent

simply refrained from adhering to his commitments, though the respondent never failed in raising payment demands irrespective of the pace of construction, but when it came to completing construction and handing over possession after receipt of occupation certificate, they failed miserably.

18. 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 complainants for so many years thereby causing wrongful loss to the complainants and wrongful gain to the respondent.
19. That the complainants were further agonized when they came to know that they 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. Non-availability of any safety of insurance cover has robbed the complainants of their peace of mind and they live under constant fear. Multiple instances of earthquake in recent months have shaken the complainants.
20. The respondent simply duped the complainants of their hard-earned money and life savings. Further, the complainants 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 complainants.

21. 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 allottees shall be carried out by the promoter within three months from the date of issue of occupation certificate.
22. That vide-email dated 25.09.2020 sent by the respondent to the complainants, the former clearly admitted that registry was delayed by them, and it was also asserted by the respondent. It is imperative to mention here that by the aforesaid submission, the respondent itself admitted that the premises is not fit to be occupied, thereby highlighting the gross misconduct on its part and also pointing out the injustice meted out to the complainants and other buyers of the tower in question.
23. That the non-execution of conveyance deed is not only a violation of section 17 of the Act, 2016 but is also a violation of clause 22 of the apartment buyer agreement dated 07.01.2013 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 allottees.

24. 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. 07.01.2016 till the date of receipt of occupation certificate and offer of legal possession post that.

C. Relief sought by the complainants:

25. The complainants have 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. Award delay interest at the prescribed rate for every month of delay, from the due date of handing over possession, i.e., 07.01.2016 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.

D. Reply by respondent

- i. The present complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the apartment buyers agreement dated 07.01.2013, as shall be evident from the submissions made in the following paras of the present reply. They have come before this hon'ble authority with unclean hands. The complaint has been filed by them just to harass the respondent and to gain unjust enrichment. The actual reason for filing of the present complaint stems from the changed financial valuation of the real estate sector, in the past few years and the allottees malicious intention to earn some easy buck. The covid-19 pandemic has given people to think beyond the basic legal way and to attempt to gain financially at the cost of others. They have instituted the present false and vexation complaint against the respondent who has already fulfilled its obligation as defined under the ABA. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainants, 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.
- ii. It is submitted that the complainants entered into an ABA with respondent owing to the name, goodwill and reputation of the

respondent, the respondent in terms with the ABA, promised to deliver the possession the residential unit within the time frame as defined under clause 15 of the ABA. That thus accordingly the possession was offered on 24.01.2017. that due to external circumstances which were not in control of the respondent, minor timeline alterations occurred in completion of the project. It is further submitted that the complainants have since been residing in the residential apartment and now after nearly 3 years they have come before this hon'ble authority and are making false claims to gain monetary benefits. The present complaint thus, not having a speck of truth and genuineness ought to be dismissed and heavy cost be imposed upon the complainants for wasting the precious time of the hon'ble authority.

- iii. The present complaint of the complainants has been filed on the basis of incorrect understanding of the object and reasons of enactment of the Act, 2016. The legislature in its great wisdom, understanding the catalytic role played by the real estate sector in fulfilling the needs and demands for housing and infrastructure in the country, and the absence of the regulatory body to provide professionalism and standardization to the said sector and to address all the concerns of both buyers and promoters in the real estate sector, drafted and notified the RERA Act, 2016 aiming to gain a healthy and orderly growth of the industry. The Act has been enacted to balance the interests of consumer and promoter by imposing certain responsibilities on both. Thus, while section 11 to section 18 of the Act, 2016 describes and prescribes the

function and duties of the promoter, section 19 provides the rights and duties of allottees. Hence, the RERA Act, 2016 was never intended to be biased legislation preferring the allottees, rather the intent was to ensure that both the allottees and the developer be kept at par and either of the party should not be made to suffer due to act and/ or omission of part of the other.

- iv. The present complaint in the manner of its portrayal of facts and circumstances creates a façade and attempts to hide the actual truth of the matter. It is humbly submitted that the respondent had sent letter dated 24.01.2017 intimating the complainants of the offer to take the physical possession of residential apartment/flat till 14.02.2017. That after the letter was received by them, the further formalities were completed, and the physical possession of the subject matter property was given to them. The said position has already been admitted by them and the letter dated 24.01.2017 is being annexed herewith and marked as annexure R-2.
- v. That it is submitted that the complainants voluntarily with free will and consent has taken over the possession of the apartment on 31.03.2017 after satisfying with all the terms and conditions of the handing over of possession letter dated 31.03.2017. The respondent humbly submits that the complainants executed the apartment handover letter dated 31.03.2017 whereby the complainants took over peaceful and vacant physical possession of the apartment in question after fully satisfying themselves with regard to its measurements, location, dimension, approvals and development etc. It was

further explicitly stated by the complainants 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. The respondent relying upon the aforesaid representation had changed its position to its detriment and proceeded to deliver possession of the apartment in question. Therefore, the instant complaint is barred by estoppels. It is apropos to mention here that the complainants took the possession voluntarily with free will and post giving aforesaid representation, hence, the present complaint is not maintainable as the complainants are enjoying the peaceful possession of his apartment since 2017. The complainants have waived off his rights to claim the delay interest charges way back in 2017 and therefore, the present complaint is nothing but just an afterthought of the complainants to harass the respondent.

- vi. That the complainants are attempting to seek an advantage of the slowdown in the real estate sector and it is apparent from the facts of the present case that the main purpose of the present complaint is to harass the respondent by engaging and igniting frivolous issues with ulterior motives to pressurize the respondent. Thus, the present complaint is without any basis and no cause of action has arisen till date in favour of the complainants and against the respondent and hence, the complaint deserves to be dismissed. It is brought to the knowledge of this hon'ble authority that the complainants

are guilty of placing untrue facts and is attempting to hide the true colour of the intention of the complainants. That before signing the ABA the complainants were well aware of the terms and conditions as imposed upon the parties under the ABA and only after thorough reading, the said ABA got signed and executed. That further the hurdles faced by the respondent in execution of the development activities were informed to the complainants and nothing was hidden by the respondent.

- vii. That a trend has been seen lately that even in situations where the allottees have taken the possession of the flat/apartment after satisfying themselves, yet on becoming aware of the RERA provisions, have attempted to get wrongful gain by filing false and frivolous complaints against the builder/promoters. That such a trend has resulted in misuse and misapplication of power and legal provisions, in order to obtain unreasonable and undue advantage. It is humbly submitted that at the time of inception of the Consumer Protection Act, 1986, people realised that the provisions of the statute being in favour of the consumer, could lay their hands on easy money and thus began a trend of filing of false and frivolous complaint there in and similar trend is on rise under the RERA Act. However, it is the responsibility of the Hon'ble Authority to dismiss such illegal and perverse complaints summarily and to take stringent action against the wrongdoer. It is humbly submitted before this hon'ble authority that by following due process of law and laying down precedent such

malicious, wrongful, greed filled, frivolous and baseless complaints be not entertained.

viii. It is evident that the entire case of the complainants are nothing but a web of lies and the false and frivolous allegations made against the respondent are nothing but an afterthought, hence the present complaint filed by the complainants deserves to be dismissed with heavy costs. That the various contentions raised by the complainants are fictitious, baseless, vague wrong and created to misrepresent and mislead this hon'ble authority, for the reasons stated above. It is further submitted that none of the relief as prayed for by the complainants are sustainable, in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the precious time and efforts of this hon'ble authority. 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 complainants at a later stage.

F. Findings regarding relief sought by the complainants:

Relief sought by the complainants:

G.I Award delay interest at the prescribed rate for every month of delay, from the due date of handing over possession, i.e., 07.01.2016 till offer of valid possession after receipt of OC.

25. In the present complaint, the complainants 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."

26. Clause 15 of the apartment, provides for handing over possession and the same is reproduced below:

15. Schedule for possession of the said apartment

The developer 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 unless there shall be delay or there shall be failure due to reasons mentioned in clauses 17,18 & 42 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 buyers/allottees 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 buyers/allottees 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 allottees that even a single situation may make the possession clause irrelevant for the purpose of allottees 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 allottees 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 allottees 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 allottees are left with no option but to sign on the dotted lines.

30. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges, proviso to section 18 provides that where an allottees 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: 1

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., [Q](#), the marginal cost of lending rate (in short, MCLR) as on date 0 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 complainants 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 allottees 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 allottees 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 allottees 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 allottees. 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 allottees 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 24.01.2017, by the promoter to the allottees is not valid, the same being made without obtaining occupation certificate but the allottees have already taken possession on the

- basis of offer of possession 24.01.2017 and is continuing as such and enjoying that the property. They are certainly entitled to delay possession charges but only from the due date 07.01.2016.
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 07.01.2013, 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 07.01.2016. The offer of possession made by the respondent/promoter on 24.01.2017 after a gap of more than 1 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 by inviting the complainants to take possession by 24.01.2017. Accordingly, on 31.03.2017 the possession was taken by the complainants herein after making final payments due against unit in question. The complainants have also stated that they 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 complainants have already taken over possession, accordingly from the date they have taken over possession, they cannot be allowed delayed possession charges. Although the possession has been offered wrongly by the respondent as mentioned above. However, the complainants shall be entitled for DPC from the due date of possession till actual taking over the possession.

F.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.

40. The complainants are asking for the registration of conveyance deed and transfer of title in accordance with section 17 of the Act of 2016. The complainants in the present complaint has taken possession of the unit on 31.03.2017 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 statute and as per the BBA signed between the mutual of consent of 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 allottees 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 allottees 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., 07.01.2016 till actual taking over the possession i.e., 31.03.2017.
 - 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 complainants on her depositing necessary charges within 3 months and failing 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

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 12.04.2022


(Dr. K.K. Khandelwal)

Chairman