BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**828 of 2022**
Date of filing	**:**	**07.03.2022**
First date of hearing:		**30.03.2022**
Date of decision	**:**	**01.09.2022**

1. 2.	Sh. Vipin Arora S/o Sh. Yashpal Arora Smt. Pooja Arora W/o Sh. Vipin Arora **Both R/o:** 27-B, Old Anarkali, Krishna Nagar, Delhi-110051	**Complainants**
	Versus	
	Almond Infrabuild Private Limited **Regd. office:** 711/92, Deepali, Nehru Place, New Delhi-110019	**Respondent**

CORAM:	
Dr. KK Khandelwal	**Chairman**
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**

APPEARANCE:	
Shri Shashi Kant Sharma (Advocate)	Complainants
Shri Gaurav Bhardwaj (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainants/allottees in Form CRA 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 to the allottee as per the agreement for sale executed inter-se them.

A. Unit and Project related details:

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

S. N.	Particulars	Details
1.	Name of the project	"ATS Tourmaline", Sector- 109, Gurgaon
2.	Nature of project	Group housing project
3.	**DTPC License no.**	250 of 2007 dated 02.11.2007
	Validity status	01.11.2019
	Licensed area	19.768 acres
	Name of licensee	Raj Kiran & 2 others
4.	**RERA registered/not registered**	Registered vide registration no. 41 of 2017 dated 10.08.2017
	Validity status	10.08.2023
5.	Application dated	12.06.2018 [As per page no. 24 of complaint]
6.	Allotment letter dated	26.02.2014 [As per page no. 59 of complaint]
7.	Old unit details	
	Unit no.	5094 on 9th floor of tower 05

		[As per page no. 59 of complaint]
	Unit area admeasuring	1750 sq. ft. [Super area] [As per page no. 59 of complaint]
8.	Revised unit details (Changed on request of the complainants)	
	Unit no.	5222 on 22nd floor of tower 05 [As per page no. 44 of complaint]
	Unit area admeasuring	2150 sq. ft. [Super area] [As per page no. 44 of complaint]
9.	Date of apartment buyer agreement	26.02.2014 [As per page no. 57 of complaint]
10.	Agreement to sale	14.06.2018 [As per page no. 22 of complaint]
11.	Payment plan	Construction linked payment plan [As per page no. 92 of complaint]
12.	Total sale consideration	Rs. 1,62,62,413/- [As per payment plan annexed as schedule F on page no. 48 of complaint]
13.	Amount paid by the complainants	Rs. 1,61,75,625/- [As per ledger dated 31.03.2020 on page no. 54 of complaint]
14.	Possession clause	**Clause 7.1 of agreement to sale** *The Promoter assures to handover the position of the apartment for residential usage along with car parking (if applicable **), on or before 31 March 2019** ,unless there is delay due to force majeure, government policies/Guidelines , decisions*

		affecting the regular development of the real estate project. if ,the completion of the project is delayed due to the above conditions, then the allottee agrees that the promoter shall be entitled to the extension of the time for delivery of possession of the apartment for residential usage.
15.	Due date of possession	**31.03.2019** [As per clause 7.1 of agreement for sale]
16.	Occupation certificate	09.08.2019 [As per page no. 54 of reply]
17.	Offer of possession	09.08.2019 [As per page no. 94 of complaint]

B. Facts of the complaint

3. That complainants after going through the inducement of respondent's project wherein the respondent has given huge advertisement and offers on the project shown their willingness vide to purchase an apartment bearing no. 5222 with two car parking's measuring super area of 2150 sq. ft. on 22nd floor of tower 5 for total consideration of Rs. 1,62,62,413/-.

4. That the said flat was booked on 12.06.2018 and the buyer's agreement was also executed on 14.06.2018 and as per terms and conditions of the buyer's agreement, respondent were supposed to handover the flat on or before 31.03.2019.

5. That after execution of buyer's agreement the complainants took a loan for sum of Rs. 1,07,00,000/- from HDFC Bank. In this regard a tripartite agreement was also executed between HDFC bank, complainants and respondent. He has made a total sum of Rs. 1,61,75,625/- till 2019. The unit of the complainants replaced from unit no. 5094 to unit no. 5222 in 2018 in the same tower and NOC in favour of respondent was issued by HDFC Bank.

6. That the possession of the apartment was supposed to be delivered to complainants, but despite completion of the time it has miserably failed to give the possession of the flat till date. It is also respectfully submitted that the flat is not in a condition to take possession till date.

7. That the complainants paid the amount from time to time as and when such demands were raised by respondent. On 09.08.2019, it issued a letter of offer of possession wherein the respondent demanded a sum of Rs. 13,36,787/- and instructed to clear the outstanding within a period of 21 days i.e. 30.08.2019, further stating that on receipt of the entire payment the respondent will hand over the possession of the apartment with full furnished within a period of 90 days.

8. That on 11.10.2019 the complainants cleared all the dues as demanded by the respondent and on the same day complainants requested to furnish and ready the flat as soon as possible. According to offer of possession letter 09.08.2019, the respondent was supposed to handover the full furnished apartment till 22.11.2019 but till date no

physical possession intimation has been given by it even the apartment is still not in condition to take possession. It is respectfully submitted that respondent issued offer of possession only to save the PRE EMI interest.

9. That from 2019 the complainants made various personal visit and requested it to complete the furnishing work and handing over the flat but on each and every visit the respondent gave the answer that the finishing work is going on and the possession of the flat would be delivered very shortly. However, when the complainants visited the flat personally, they were astonished to note that no work has been done by the respondent and the flat was in the same condition as before.

10. That from 2019 they sent various reminders by mail vide emails dated from 13.02.2020 to 23.12.2021, in addition to telephonic calls, messages regarding completion of finishing work and handing over the possession of the flat as well as refund of lift charges but the respondent failed to provide any confirm date for physical possession of the apartment.

11. That the complainants communicated financial hardships owing to Bank EMIs leading to mental and financial distress with request to handover flat possession on priority. However there had been no update till date on the confirm date of physical possession of the flat.

12. That despite various follow ups by them, the respondent failed to complete and handover the possession of the allotted unit revealing that it cheated and defrauded the complainants from the very beginning and misused their hard-earned money. Due to such delay in handing over the possession, cheating and fraud committed by respondent, they are no more interested to show their willingness to proceed further.

13. That at the time of booking of the flat the sale cost indicated was Rs. 1,62,62,413/- and despite payment of Rs. 1,61,75,625/- to the respondent, it failed to handover the peaceful possession of the flat to the complainants till date. They lastly visited the project site in November 2021 and astonished to note that the flat is still lying in highly incomplete stage.

C. Relief sought by the complainants:

14. The complainants have sought following relief:

    i. Direct the respondent to handover the possession of the allotted unit.

    ii. Direct the respondent to pay interest for every month of delay at the prevailing rate of interest.

15. On the date of hearing, the authority explained to the respondent/promoter about the contravention as alleged to have been committed in relation to section 11(4)(a) of the Act to plead guilty or not to plead guilty.

D. Reply by the respondent:

16. That the complaint is not maintainable for the reason that the agreement contains clause 21, an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute.

17. That the complainants, after checking the veracity of the project namely, 'ATS Tourmaline', Sector 109, Gurugram applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. Based on the application of the complainants, unit no. 5094, tower no. 5 was allotted to the complainants but later the booking was shifted to unit no. 5222 in the same tower.

18. That the buyer's agreement was executed on 26.02.2014 when Act of 2016 was not in force and the provisions of said Act cannot be enforced retrospectively. The complainants have consciously, and voluntarily executed buyer's agreement dated 26.02.2014 after reading and understanding the terms and conditions incorporated therein to their full satisfaction. Once a contract is duly executed between the parties, then their entire rights and obligations thereto are wholly encapsulated in and determined by the said contract which remains binding on the parties thereto. The complaint preferred by the complainants is fallacious, unfounded and illusory. Later when the booking is shifter to the unit no. 5222, a fresh agreement of sale was executed between the complainants and the respondent on 14.06.2018.

19. That the complainants after reading, understanding and verifying the terms and conditions stipulated in the documents pertaining to the allotment including the agreement and after satisfying themselves about the right, title, location and limitation in the project of the respondent had accordingly applied vide application dated 24.08.2013. No objection against the terms of the documents including the agreement was raised by them. Moreover, they inspected and satisfied themselves with the facts, ownership records and documents relating to the title of the land, sanctioned building plans, permits/licenses/consents for constructions of the apartment.

20. That the sale consideration of Rs.1,62,62,413/- was not the total sale consideration as wrongly alleged and the said amount was exclusive of registration charges, stamp duty, maintenance charges, service tax, proportionate taxes and charges and other charges which were payable by the complainants towards the total sale consideration and the same was agreed vide clause 1 of the agreement for sale. As per the same clause of the buyer's agreement, timely payment by the complainants of the basic sale price and other charges as stipulated in the payment plan was to be the essence of the agreement.

21. That the possession of the unit was supposed to be offered to the complainants in accordance with clause 6.2 of the buyer's agreement which was subject to the occurrence of the force majeure events.

22. That the implementation of the said project was hampered and most of the work was stalled due to non-payment of instalments by allottees on time and also due to the events and conditions which were beyond the control of respondent and which have affected the materially affected the construction and progress of the project. Some of the force majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under :

I) Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization: [Only happened second time in 71 years of independence hence beyond control and could not be foreseen]. The respondent had awarded the construction of the project to one of the leading construction companies of India. The said contractor/ company could not implement the entire project for approx. 7-8 months w.e.f. from 9-10 November 2016, the day when the Central Government issued notification with regard to demonetization. During this period, the contractor could not make payment to the labour in cash and as majority of casual labour force engaged in construction activities in India do not have bank accounts and were paid in cash on a daily basis. During demonetization, the cash withdrawal limit for the companies was capped at Rs. 24,000 per week initially whereas cash payments to labour on a site of the magnitude of the project in question were Rs. 3-4 lakhs per day and the work at site got almost halted for 7-8 months as

bulk of the labour being unpaid went to their hometowns, which resulted into shortage of labour. Hence, the implementation of the project in question got delayed due on account of issues faced by contractor due to the said notification of Central Government.

Further there are studies of Reserve Bank of India and independent studies undertaken by scholars of different institutes/universities and also newspaper reports of Reuters of the relevant period of 2016-17 on the said issue of impact of demonetization on real estate industry and construction labour. The Reserve Bank of India has published reports on impact of Demonetization. In the report- macroeconomic impact of demonetization, it has been observed and mentioned by Reserve Bank of India at page no. 10 and 42 of the said report that the construction industry was in negative during Q3 and Q4 of 2016-17 and started showing improvement only in April 2017.

That in view of the above studies and reports, the said event of demonetization was beyond the control of the respondent, hence the time period for offer of possession should deemed to be extended for 6 months on account of the above.

II) Orders Passed by National Green Tribunal: In last four successive years i.e. 2015-2016-2017-2018, Hon'ble National Green Tribunal has been passing orders to protect the environment of the country and especially the NCR region. The Hon'ble NGT had passed orders governing the entry and exit of vehicles in NCR region. Also, the Hon'ble

NGT has passed orders with regard to phasing out the 10-year-old diesel vehicles from NCR. The pollution levels of NCR region have been quite high for couple of years at the time of change in weather in November every year. The contractor of the respondent could not undertake construction for 3-4 months in compliance of the orders of Hon'ble National Green Tribunal. Due to that, there was a delay of 3-4 months as labour went back to their hometowns, which resulted in shortage of labour in April -May 2015, November- December 2016 and November- December 2017. The district administration issued the requisite directions in this regard.

In view of the above, construction work remained very badly affected for 6-12 months due to the above stated major events and conditions which were beyond the control of the respondent and the said period is also required to be added for calculating the delivery date of possession.

(III) Non-Payment of Instalments by Allottees: Several other allottees were in default of the agreed payment plan, and the payment of construction linked instalments was delayed or not made resulting in badly impacting and delaying the implementation of the entire project.

(IV) Inclement Weather Conditions viz. Gurugram: Due to heavy rainfall in Gurugram in the year 2016 and unfavourable weather conditions, all the construction activities were badly affected as the whole town was waterlogged and gridlocked as a result of which the implementation of the project in question was delayed for many weeks.

Even various institutions were ordered to be shut down/closed for many days during that year due to adverse/severe weather conditions.

(V) Covid-19 Outbreak-: The outbreak of the deadly Covid-19 virus has resulted in significant delay in completion of the construction of the projects in India and the real estate industry in NCR region suffered tremendously. The outbreak resulted in not only disruption of the supply chain of the necessary materials but also in shortage of the labour at the construction sites as several labourers have migrated to their respective hometowns. The Covid-19 outbreak which has been classified as 'pandemic' is an Act of God and the same is thus beyond the reasonable apprehension of the respondent.

23. That the respondent after completing the construction of the unit in question obtained the occupation certificate from concerned authorities on 09.08.2019 and offered the possession of the unit to them vide letter dated 09.08.2019. They were intimated to remit the outstanding amount on the failure of which the delay penalty amount would accrue. The complainants were bound to take the physical possession of the unit after making payment towards the due amount along with interest and holding charges.

24. That the complainants are real estate investors who had invested their money in the project of the respondent with an intention to make profit in a short span of time. However, their calculations have gone wrong on account of slump in the real estate market and they are now deliberately

trying to unnecessarily harass, pressurize and blackmail the respondent to submit to their unreasonable demands.

25. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided based on these undisputed documents.

E. Jurisdiction of the authority

26. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter 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.

So, in view of the provisions of the Act of 2016 quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainants at a later stage.

F. Findings on the objections raised by the respondent:

F.I Objection regarding complainants is in breach of agreement for non-invocation of arbitration.

27. The respondent has raised an objection that the complainants have not invoked arbitration proceedings as per the provisions of buyer's agreement which contains provisions regarding initiation of arbitration proceedings in case of breach of agreement. The following clause has been incorporated w.r.t arbitration in the apartment buyer's agreement:

> *"Clause 21: All or any disputes that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be governed by the Arbitration and Conciliation Act, 1996 and any statutory amendments/modifications thereto by a sole arbitrator who shall be mutually appointed by the parties or if unable to be mutually appointed then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties"*

28. The respondent contended that as per the terms & conditions of the application form duly executed between the parties, it was specifically agreed that in the eventuality of any dispute, if any, with respect to the

provisional booked unit by the complainants, the same shall be adjudicated through arbitration mechanism. The authority is of the opinion that the jurisdiction of the authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently the authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, in ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreements between the complainants and builder could not circumscribe the jurisdiction of a consumer.

29. While considering the issue of maintainability of a complaint before a consumer forum/commission in the face of an existing arbitration clause in the builder buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision***

petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017 **decided on 10.12.2018** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the aforesaid view. The relevant para of the judgement passed by the Supreme Court is reproduced below:

> *"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

30. Therefore, in view of the above judgements and considering the provisions of the Act, the authority is of the view that complainants are well within the right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.II Objection regarding entitlement of delay possession charges on account of complainants being investors.

31. The respondent has taken a stand that the complainants are the investors and not consumers, therefore, they are not entitled to the protection of the Act and thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is enacted to protect the interest of consumers of the real estate sector. It is settled principle of interpretation that the preamble is an introduction of a statute and states main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon careful perusal of all the terms and conditions of the apartment buyer's agreement, it is revealed that the complainants are buyer and they have paid total price of Rs. 1,61,75,625/- to the promoter towards purchase of an apartment in the project of the promoter. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

> *"2(d) "allottee" in relation to a real estate project means the person to whom a plot, apartment or building, as the case may be, has been allotted, sold (whether as freehold or leasehold) or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or*

otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"

In view of above-mentioned definition of "allottee" as well as all the terms and conditions of the apartment buyer's agreement executed between promoter and complainants, it is crystal clear that the complainants are allottee(s) as the subject unit was allotted to them by the promoter. The concept of investor is not defined or referred in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having a status of "investor". The Maharashtra Real Estate Appellate Tribunal in its order dated 29.01.2019 in ***appeal no. 0006000000010557 titled as M/s Srushti Sangam Developers Pvt. Ltd. Vs. Sarvapriya Leasing (P) Lts. And anr.*** has also held that the concept of investor is not defined or referred in the Act. Thus, the contention of promoter that the allottee being investors are not entitled to protection of this Act also stands rejected.

F.III Objection regarding force majeure conditions:

32. The respondent-promoter alleged that there was delay in handing over of possession on account of force majeure circumstances and such period shall not be considered while calculating delay in handing over of possession. The respondent-promoter raised the contention that the construction of the project was delayed due to force majeure conditions such as demonetization, shortage of labour, various orders passed by NGT to control weather conditions in Gurugram and non-payment of instalment by different allottees of the project but all the pleas

advanced in this regard are devoid of merit. The agreement to sale was executed between the parties on 14.06.2018 and as per terms and conditions of the said agreement for sale dated 14.06.2018, the due date of handing over of possession was 31.03.2019. The events such as demonetization and various orders by NGT in view of weather condition of Delhi NCR region, were for a shorter duration of time and were not continuous. Hence, in view of aforesaid circumstances no grace period can be allowed to the respondent-builder. Moreover, the complainants have already paid an amount of Rs. 1,61,75,625/- against total consideration of Rs. 1,62,62,413/- constituting more that 99% of total consideration, thus, the plea that the project is delayed on account of non-payment of allottees is devoid of merits and rejected. Thus, the promoter-respondent cannot be given any leniency on bases of aforesaid reasons. It is well settled principle that a person cannot take benefit of his own wrong.

33. As far as delay in construction due to outbreak of Covid-19 is concerned, Hon'ble Delhi High Court in case titled as ***M/s Halliburton Offshore Services Inc. V/S Vedanta Ltd. & Anr. bearing no. O.M.P (I) (Comm.) no. 88/ 2020 and I.As 3696-3697/2020*** dated 29.05.2020 has observed that-

> *"69. The past non-performance of the Contractor cannot be condoned due to the COVID-19 lockdown in March 2020 in India. The Contractor was in breach since September 2019. Opportunities were given to the Contractor to cure the same repeatedly. Despite the same, the Contractor could not complete the Project. The outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself."*

The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by 31.03.2019 and is claiming benefit of lockdown which came into effect on 23.03.2020 whereas the due date of handing over of possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, the authority is of the view that outbreak of a pandemic cannot be used as an excuse for non- performance of a contract for which the deadlines were much before the outbreak itself and for the said reason, the said time period is not excluded while calculating the delay in handing over possession.

G. Findings regarding relief sought by the complainants.

34. **Relief sought by the complainants:**

G.I Direct the respondent to handover the possession of the allotted unit.

35. The complainants alleged that although the unit was offered by the respondent on 09.08.2019 but possession of the same was yet not handed over to them.

36. The authority is of considered view that a valid offer of possession must contain following pre-requisites:-

a. The possession must be offered after obtaining occupation certificate;

b. The subject unit should be in habitable condition;

c. The possession should not be accompanied by unreasonable additional demands.

37. In the present case, the respondent-builder offered the possession of the allotted unit on 09.08.2019 after obtaining occupation certificate, along with demand of Rs. 13,36,787/- payable by 30.08.2019. The unit is offered after obtaining OC, which also implies that the unit is habitable in nature. Habitability of unit is different from completion of unit as per specifications of buyer's agreement. Therefore, two out of three aforesaid conditions are fulfilled. The complainants in the present case, didn't challenged the demand raised by the respondent rather stated that the unit is not complete.

38. The authority observes that the complainants have already paid an amount of Rs. 1,61,75,625/- which approximately constitutes more than 99% of total consideration of Rs. 1,62,62,413/- and there is only a meagre amount left payable by the complainants, moreover, if the complainants are allowed delay possession charges from due date of handing over of possession i.e. 31.03.2019 till offer of possession plus two months i.e. 09.10.2019, then it will be the respondent who will be liable to pay amount to the complainants. Thus, it is right to conclude that the after adjustment of delay possession charges, nothing more remains to be paid by the complainants-allottees rather, it shall be the promoter who shall be required to make payment to the complainants. Despite making almost complete consideration of allotted unit and

various requests of the complainants vide emails annexed as annexure C-8 on page no. 99-127 of complaint, the respondent failed to handover the possession of the allotted unit.

39. The respondent through its counsel stated at the bar that the occupation certificate has already been obtained on 09.08.2019 and subsequently, offer of possession was also made on 09.08.2019.

40. In view of aforesaid circumstances, the authority directs the respondent to handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within 2 weeks from date this order i.e. 01.09.2022.

G. II Direct the respondent to pay interest for every month of delay at the prevailing rate of interest.

41. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges as provided under the proviso to section 18(1) of the Act. Sec. 18(1) proviso reads as under:

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

42. The parties entered into a buyer's agreement dated 26.02.2014 for the unit bearing no. 5094 but subsequently the said unit was revised to unit no. 5222 of similar tower. An agreement for sale dated 14.06.2018 was executed between the parties to acknowledge the change in unit. The

complainants have voluntarily entered into the subsequent agreement for sale; thus, the authority relies on the concept of doctrine of waiver. The Doctrine of Waiver finds its place under Section 63 of the Contract Act, 1872 which provides for relinquishment of rights between the parties. Rights that may be relinquished include obligations as well as claims that had been earlier consented to be performed and exercised by the parties. Thus, the waiver of right under Section 63 of the Contract Act has to be a matter of mutual consensus. It is an act of surrender of benefit or privilege. The waiver of right requires a prior-knowledge of an existing right by the person who seeking waiver of such right. As decided in ***Manak Lal v. Dr. Prem Chand Singhvi AIR 1957 SC 425,*** a person is required to be fully cognizant of his rights before waiving off such rights. Therefore, the due date of handing over of possession shall be calculated as per the terms of new agreement for sale executed interse parties on 14.06.2018.

43. As per clause 7.1 of the agreement to sale dated 14.06.2018, the possession of the subject unit was to be handed over by 31.03.2019. Clause 7.1 of the agreement to sale provides for handover of possession and is reproduced below:

> *"As per clause 7.1: The Promoter assures to handover the position of the apartment for residential usage along with car parking (if applicable), on or before 31 March 2019 ,unless there is delay due to force majeure, government policies/Guidelines , decisions affecting the regular development of the real estate project. if ,the completion of the project is delayed due to the above conditions, then the allottee agrees that the promoter shall be entitled to the extension of the time for delivery of possession of the apartment for residential usage."*

44. The flat buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders/promoters and buyers/allottees are protected candidly. The 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 flat buyer's 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 about 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. In pre-RERA period it was a general practice among the promoters/developers to invariably draft the terms of the apartment buyer's agreement in a manner that benefited only the promoters/developers. It had arbitrary, unilateral, and unclear clauses that either blatantly favoured the promoters/developers or gave them the benefit of doubt because of the total absence of clarity over the matter.

45. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, 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.

46. 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.

47. 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., 01.09.2022 is @ 8%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10%.

48. The definition of term 'interest' as defined under section 2(za) of the Act provides that the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default. The relevant section is reproduced below:

"(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.
Explanation. —For the purpose of this clause—
(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;"*

Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10% by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

49. However, the issue arises before the authority is that up to which date, the delay possession charges to be allowed to the complainants as despite offer of possession dated 09.08.2019 after obtaining occupation certificate, the possession of the subject unit is yet to be handed over to them. The authority observes that the complainants have already paid an amount of Rs. 1,61,75,625/- which approximately constitutes more than 99% of total consideration of Rs. 1,62,62,413/-. However, the respondent stands firm at its submissions and documents submitted by it that the offer of the subject unit has already been made. The authority is of considered view that as per section 11(4)(b) of Act of 2016, the occupation certificate is received, the respondent-builder would be obligated to supply a copy of same to the complainants individually or to the association of allottees, as the case may be. On the other hand, as per section 19(10) of Act of 2016, the allottee is under an obligation to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. So technically, offer of possession asserts as a vital document which acts a bridge between section 11(4)(b), whereas respondent-builder as per obligation conferred over him, shall supply the copy of occupation certificate to the complainant and on the other hand, the complainant therefore, as per section 19(10) would initiate it's process for taking possession of the allotted unit. Therefore, this can be concluded that the fulfilment of obligation

conferred over the allottee under section 19(10) of Act, is dependent over the fulfilment of obligation by the respondent under section 11(4)(b) and in the present case, the respondent has offered the possession of the unit on 09.08.2019. The fact cannot be ignored that the complainant-allottee had the knowledge of receiving occupation certificate by the respondent promoter and the occupation certificate being public document was accessible to the complainants on the website of DTCP.

50. Therefore, the complainants have failed to fulfil the obligation conferred upon them vide section 19(10) of Act of 2016. However, it was submitted by the complainants that despite several follow ups, the respondent still failed to handover the possession of the allotted unit and the unit is still not complete as per specifications mention therein the buyer's agreement.

51. On consideration of the circumstances, the evidence and other record and submissions made by the complainant and the respondent and based on the findings of the authority regarding contravention as per provisions of Act, the authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 6.2 of the flat agreement for sale executed between the parties on 14.06.2018, possession of the booked unit was to be delivered by 31.03.2019.

52. The authority hearing the parties at length and to balance the rights of both the parties, comes to a conclusion that the non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent is established and accordingly, the complainants are entitled for delayed possession charges @10% p.a. w.e.f. from due date

of possession i.e. 31.03.2019 till offer of possession plus two months as per section 18(1) of the Act of 2016 read with rule 15 of the rules. The respondent-builder is directed to handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within 2 weeks from date this order i.e. 01.09.2022 and to submit a compliance report in this regard failing which it shall be presumed that there was deliberate attempt on part of the respondent for not handing over the possession of the allotted unit.

H. Directions of the authority:

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

    i. The respondent is directed to handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within 2 weeks from date this order i.e. 01.09.2022.

    ii. The respondent shall pay interest at the prescribed rate i.e. 10% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e. 31.03.2019 till offer of possession(09.08.2019) plus two months i.e. 09.10.2019 as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

    iii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order.

iv. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period.

v. The rate of interest chargeable from the allottees by the promoter, in case of default shall be at the prescribed rate i.e., 10% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottees, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.

vi. The respondent shall not charge anything from the complainants which is not the part of buyer's agreement.

54. Complaint stands disposed of.

55. File be consigned to registry.

(Sanjeev Kumar Arora)
Member

(Ashok Sangwan)
Member

(Vijay Kumar Goyal)
Member

(Dr. KK Khandelwal)
Chairman
Haryana Real Estate Regulatory Authority, Gurugram

Dated:01.09.2022