

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

Complaint no. : 76 of 2021
First date of hearing: 22.04.2021
Date of decision : 06.10.2021

Mr. Mangal Singh Goel

Address: - 146, Shivalik Appts, Alakanda, Delhi-
110019

Complainant

Versus

Imperia Structures Ltd.

Regd. Office: - A-25, Mohan Cooperative Industrial
Estate, Mathura Road, New Delhi- 110044

Respondent

CORAM:

Shri Samir Kumar
Shri Vijay Kumar Goyal

**Member
Member**

APPEARANCE:

Sh. Gaurav Rawat
Ms. Tanya Swarup

Advocate for the complainant
Advocate for the respondent

ORDER

1. The present complaint dated 21.01.2021 has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under

the provision of the Act or the rules and regulations made thereunder or to the allottee as per the agreement for sale executed inter se.

A. Unit and project related details

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

S. No.	Heads	Information
1.	Project name and location	"Esfera, Phase-II", Sector-37c, village gharoli khurd and basai, Gurugram
2.	Licensed area	17 acres
3.	Nature of the project	Group housing residential colony
4.	DTCP license no.	64 of 2011 dated 16.07.2011
	License valid up to	15.07.2017
	Licensee	M/s Prime Infoways Pvt. Ltd., M/s Prime IT Solutions Pvt. Ltd., M/s Phoenix Datatech Services Pvt. Ltd.
5.	RERA registered/not registered	Registered vide 352 of 2017 dated 17.11.2017
	Validity	Valid upto 31.12.2020
6.	Date of approval of building plan	18.12.2012
7.	Unit no.	1301, 13 th Floor, Block-G (Page no. 30 of the complaint)

8.	Unit measuring	1650 sq. ft. (Page no. 30 of the complaint)
9.	Date of booking	19.11.2011 (Page no. 21 of the complaint)
10.	Date of execution of flat buyer's agreement	20.05.2013 (Page no. 28 of the complaint)
11.	Payment plan	Construction linked payment plan (Page no. 72 of the complaint)
12.	Total consideration	Rs. 74,03,750/- (Page no. 36 of the complaint)
13.	Total amount paid by the complainant	Rs. 72,36,195 (As alleged by the complainant on page no. 12 of the complaint)
14.	Due date of delivery of possession (as per clause 10.1, possession be handed over within a period of three and half years from the date of execution of the agreement)	20.11.2016 Calculated from the date of execution of agreement
X 15.	Offer of possession	22.02.2018 Not offered (Page no. 81 of the complaint)
X 16.	Occupation certificate	07.02.2018 Not obtained (Page no. 12 of the reply)
17.	Delay in handing over possession till offer of possession plus two months i.e., 22.04.2018	1 year 5 months 2 days date of this order 06/10/2021

B. Facts of the complaint

The complainant has submitted as under:



3. That the complainant was subjected to unethical trade practice as well as subject of harassment as apartment buyers' agreement contain biased, arbitrary and one-sided clause which are escalating cost and has many hidden charges which were not initially imposed. The apartment buyer agreement mentioned DTCP license no. 64 of 2011 in the name of M/s Phonix Data Tech Services which was transferred to the respondent company and were given legal right to collect money from the complainant against the unit no. G-1301, Tower-G, "The Esfera", Sector 37C, Gurugram and have legal & valid license to develop this project.
4. That the respondent has already extracted approx. 30% amount Rs. 21,98,736/- of the total sale consideration from complainant and even after that took more than 17 months to sign the apartment buyer's agreement.
5. That the based-on promises and commitment made by the respondent, complainant booked a 3BHK + 3 toilet unit admeasuring 1650 sq. ft., along with one covered car parking in unit no. G-1301, tower G in residential project "Esfera", sector 37C, Gurugram, Haryana. Basic sale price was @ 3310 per sq. ft. as per welcome letter dated 19.11.2011. The initial booking amount of Rs. 5,66,983/- (including tax) was paid on 16.11.2011 by the complainant to the respondent.



6. That the complainant was allotted the unit no. G-1301 admeasuring 1650 sq. ft. in "Esfera", sector- 37C, Gurugram, Haryana by the respondent for which the respondent sent the second welcome letter dated 23.12.2011 and changed the basic sale price from Rs.3,310/- to Rs. 3350.
7. That the respondent to deceive the complainant in their nefarious net even executed apartment buyers' agreement between the respondent and the complainant on dated 20.05.2013. The respondent created a false belief that the project shall be completed in time bound manner and in the garb of this agreement persistently raised demands due to which he was able to extract huge amount of money from the complainant.
8. That the total cost of the said unit was Rs 74,03,750/- as per agreement clause no. 1.1, out of this the complainant paid total amount of Rs. 72,36,195/- (including EDC, IDC, taxes, etc.) in time bound manner.
9. That it is pertinent to mention here that according to the receipts, the complainant has paid a sum of Rs 72,36,195/- (including EDC, IDC, tax, etc.) to the respondent after demand letters were raised by the respondent when the respondent himself did not complete the construction work. The complainant has paid more than 95% of amount till now.



10. That as per section 19(6) the Real Estate (Regulation and Development) Act, 2016 (hereinafter referred to as the Act), the complainant has fulfilled his responsibility with regard to making necessary payments in the manner and within the time specified in the said agreement. Therefore, the complainant herein is not in the breach of any of its terms of the agreement.
11. That complainant has paid all the instalments and has made timely payments amounting to Rs. 72,36,195/- (including EDC, IDC, tax, etc.) to the respondent whereas the respondent in an endeavour to extract money from allottees devised a payment plan under which the respondent collected more than 30% of the total sale consideration in advance, which is not depended or co-related to the finishing of unit and internal development of facilities and amenities due to which the respondent has not bothered himself to develop the project in timely manner.
12. That complainant booked the unit on 16.11.2011 (more than 9 year ago) and as per apartment buyers' agreement, the respondent was liable to offer possession on or before 20th November 2016 so far (clause no. 10.1).
13. That as the delivery of the unit was due on November 2016 which was prior to the coming into of force of the GST Act, 2016, it was submitted that the complainant is not liable to incur additional



financial burden of GST due to the delay caused by the respondent. Therefore, the respondent should pay the GST on behalf of the complainant but on the contrary the respondent is collecting the GST from complainant and enjoying the input credit as a bonus.

14. That one-sided buyers' agreement has been one of the core concerns of home buyers. The terms of the agreement are non-negotiable and a buyer even if he does not agree to a term, does not an option to modify it or even discuss it with the builder. This aspect has often been unfairly exploited by the builder, whereby the buyer imposes unfair and discriminatory terms and conditions. The complainant was subjected to unethical trade practice as well as subject to harassment, agreement buyers' agreement clause of escalation cost, many hidden charges which was forcefully imposed on buyer at the time of possession as tactics and practice used by builder guise of a biased, arbitrary and discriminatory.
15. That respondent was liable to hand over the possession of the said unit on or before 20.11.2016 as per apartment buyers' agreement clause no. 10.1, but the same is far from completion. The respondent after delay of more than 1 year offered the possession of the unit to the complainant vide letter dated 22.02.2018. It is pertinent to mention here that even after issuance of possession letter the

respondent has failed to complete the construction in satisfactory manner as the unit is not in habitable condition.

16. That the respondent/builder unilaterally changed the tower of allottee from G to H and a new unit was allotted but the same lacked the facilities such as a corner and park facing, which were earlier available to the complainant and for which the respondent two PLC charges (park facing and corner facing) from the complainant/allottee but in the offer of possession, did not adjust the amount paid against PLC in final demand.
17. That the respondent at the time of offer of possession forcibly imposed escalation cost of Rs. 4,28,560/- and increased the super area of the unit from 1650 sq. ft. to 1760 sq. ft. but the respondent surreptitiously left the carpet area same as it was before. Due to increase in super area the amount payable was increased and it created extra burden on the complainant which was objected by the complainant at the time of offer of possession.
18. That the complainant wrote several letters and requested to the respondent to send two months' prior demand notice for payment and also requested copy of govt. approved building plan but no response was received from the respondent.
19. That the complainant wrote the letter to respondent regarding illegal demands raised at the time of offer of possession i.e., escalation cost,

increase cost and other charge for which the complainant objected at the time of offer of possession. The demands were unjustified and illegal but there was no response from the respondent to the objection raised by the complainant.

20. That keeping in view the snail paced work at the construction site and half-hearted promises of the respondent, the chances of getting physical possession of the assured unit in near future seems bleak and that the same is evident from the irresponsible and desultory attitude and conduct of the respondent. Consequently, injuring the interest of the buyers including the complainant who have spent their entire hard earned savings in order to buy their homes and now stands at a crossroads to nowhere. The inconsistent and lethargic manner, in which the respondent conducted its business and their lack of commitment in completing the project on time, has caused the complainant great financial and emotional loss.
21. That it was submitted that the cause of action to file the instant complaint has occurred within the jurisdiction of this authority as the unit which is the subject matter of this complaint is situated in sector 37C, Gurugram which comes within the jurisdiction of this authority.

C. Relief sought by the complainant:

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

- (i) To pass an order for delay interest on paid amount of Rs. 72,36,195/- from 26.11.2016 along with pendente lite and future interest till actual possession thereon @18%.
- (ii) Direct the respondent to immediately hand over the legal physical possession of unit in habitable condition with all amenities mentioned in brochure.

23. 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 on behalf of the respondent

The respondent has contended the complaint on the following grounds: -

- i. That, it was submitted that the present complaint has been filed by the complainant against the respondent company in respect of the tower- "G" being developed by the respondent company in its group housing project titled as "Esfera Phase II" situated at sector-37C, Gurgaon, Haryana.
- ii. That, it was submitted that the unit no. G-1301, in tower-G situated in the said project, had been allotted to the complainant by the respondent company vide allotment letter dated 26-05-2013 on the terms and condition mutually agreed by the allottee/complainant and the respondent company.
- iii. That in view of the above said, the respondent company had intended to complete the construction of the said unit on time. It is pertinent to mention that the respondent company had

successfully completed the construction of the said tower, and procured the occupancy certificates for three towers out of 9 towers in the said project. However, the construction of all the towers is completed and in habitable stage, in fact the respondent company had already applied for grant of occupation certificate for rest of the towers of project including the tower-"G", where the allotted unit situates. Further, it is pertinent to mention here that respondent company already intimated the complainant about the factum of its OC application though due to certain *force majeure* circumstance, majorly the outbreak of second COVID wave in April 2021 and subsequent lockdown in Haryana State, the DGTCP, Haryana could not issue the OC well in time enabling the respondent to offer the physical possession of the allotted unit to the complainant.

- iv. That it is reiterated that allotted unit is ready for fit out possession. It is important mention here that the project "Esfera" comprises of 2 phases whereas OC of the phase I of the project is duly issued by "Town and Country Planning Development Haryana" on 07.02.2018 and more than 100 happy allottee(s) are residing in that phase. The physical possession of the unit will be tentatively delivered to its respective allottee(s) soon with respective OC on the said project.
- v. That, the respondent company is in extreme liquidity crunch at this critical juncture, the company has also been saddled with

orders of refund in relation to 15 apartments in the project, an account of orders passed by various other courts. The total amount payable in terms of these decrees exceeds an amount of Rs.10 crores. The said project involving hundreds of allottees, who are eagerly awaiting the possession of their apartments, will be prejudiced beyond repair in case any mandatory order be passed when the project is almost completed.

- vi. That, on account of many allottees exiting the project and many other allottees not paying their installment amounts, the company, with great difficulty, in these turbulent times have managed to secure a last mile funding of Rs.99 crores from SWAMBIH Investment Fund - 1. The said Alternate Investment Fund (AIF) was established under the special window declared on 6.11.2019 by the Hon'ble Finance Minister 1 provide priority debt financing for the completion of stalled, brownfield, RERA registered residential developments that are in the affordable housing /mid-income category, are net-worth positive and require last mile funding to complete construction. The company was granted a sanction on 23.09.2020 after examination of the status of the company and its subject project "Esfera" for the amount of Rs.99 crores. However, the funding is still to be received, and the company is hoping for the same to be released shortly.
- vii. That, it is humbly submitted that this authority may be pleased to consider the bona fide of the respondent company and distinguish the respondent company from the bad repute being

imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase-2 of project "Esfera", in fact the super structure of all towers in phase-2 (incl. tower) has already been completed, the internal finishing work and MEP works is going in a full swing with almost 300 construction labourers are working hard to achieve the intent of the Appellant to complete the entire project despite all prevailing adversaries.

- viii. That, it is relevant to mention herein that several allottees have withhold the remaining payments, which is further severally affecting the financial health of the respondent company and further due to the force majeure conditions and circumstances/reasons, which were beyond the control of the respondent company as mentioned herein below, the construction works got delayed at the said project. Both the parties i.e., the complainant as well as the respondent company had contemplated at the very initial stage while signing the allotment letter/agreement that some delay might have occurred in future and that is why under the force majeure clause as mentioned in the allotment letter, it is duly agreed by the complainant that the respondent company shall not be liable to perform any or all of its obligations during the subsistence of any force majeure circumstances and the time period required for performance of its obligations shall inevitably stand extended. It is unequivocally agreed between the complainant and the respondent company that the

respondent company is entitled to extension of time for delivery of the said flat on account of force majeure circumstances beyond the control of the respondent company and inter alia, some of them are mentioned herein below:

- a) That, the respondent company started construction over the said project land after obtaining all necessary sanctions/approvals clearances from different state/central agencies/authorities and after getting building plan approved from the authority and named the project as "Esfera II". The respondent company had received applications for booking of apartments in the said project by various customers and on their requests, the respondent company allotted the under-construction apartments/ units to them.
- b) That, owing to unprecedented air pollution levels in Delhi NCR, the Hon'ble Supreme Court ordered a ban on construction activities in the region from November 4, 2019, onwards, which was a blow to realty developers in the city. The Air Quality Index (AQI) at the time was running above 900, which is considered severely unsafe for the city dwellers. Following the Central Pollution Control Board (CPCB) declaring the AQI levels as not severe, the SC lifted the ban conditionally on December 9, 2019 allowing construction activities to be carried out between 6 am and 6 pm, and the complete ban was lifted by the Hon'ble Supreme Court on 14th February, 2020.

- c) That, when the complete ban was lifted on 14 February 2020 by the Hon'ble Supreme Court, the Government of India imposed National Lockdown on 24 of March 2020 due to pandemic COVID-19, and conditionally unlocked it in 3 May, 2020. However, this has left the great impact on the procurement of material and Labour The 40-day lockdown in effect since March 24, which was further extended up to May 3 and subsequently to May 17, led to a reverse migration with workers leaving cities to return back to their villages. It is estimated that around 6 lakh workers walked to their villages, and around 10 lakh workers are stuck in relief camps. The aftermath of lockdown or post lockdown periods has left great impact and scars on the sector for resuming the fast pace construction for achieving the timely delivery as agreed under the "allotment letter".
- d) That initially, after obtaining the requisite sanctions and approvals from the concerned authorities, the respondent company had commenced construction work and arranged for the necessary infrastructure including labour, plants and machinery, etc. However, since the construction work was halted and could not be carried on in the planned manner due to the *force majeure* circumstances detailed above, the said infrastructure could not be utilized and the labour was also left to idle resulting in mounting expenses, without there being any

progress in the construction work. Further, most of the construction material, which was purchased in advance, got wasted/deteriorated causing huge monetary losses. Even the plants and machineries, which were arranged for the timely completion of the construction work, got degenerated, resulting into losses to the respondent company running into crores of rupees.

- e) That, it is also pertinent to mention here that every year the construction work was stopped/ banned/stayed due to serious air pollution during winter session by the Hon'ble National Green Tribunal (NGT), and after banned / stayed the material, manpower and flow of the work has been disturbed/distressed. Every year the respondent company had to manage and rearrange for the same and it almost multiplied the time of banned/stayed period to achieve the previous workflow. The orders already placed on record before this authority.
- f) That the real estate sector so far has remain the worst hit by the demonetization as most of the transactions that take place happen via cash. The sudden ban on Rs. 500 and Rs. 1000 currency notes have resulted in a situation of limited or no cash in the market to be parked in real estate assets. This has subsequently translated into an abrupt fall in housing demand across all budget categories. Owing to its uniqueness as an economic event,

demonetisation brought a lot of confusion, uncertainty and, most of all, especially when it came to the realty sector. No doubt, everyone was affected by this radical measure, and initially all possible economic activities slowed down to a large extent, which also affected the respondent company to a great extent, be it daily wage disbursement to procuring funds for daily construction, and day-to-day activities, since construction involves a lot of cash payment/transactions at site for several activities.

- g) That it is a well-known fact that there is extreme shortage of water in State of Haryana and the construction was directly affected by the shortage of water. Further, the Hon'ble Punjab and Haryana High Court vide an order dated 16.07.2012 in CWP No. 20032 of 2009 directed to use only treated water from available sewerage treatment plants (hereinafter referred to as "STP"). As the availability of STP, basic infrastructure and availability of water from STP was very limited in comparison to the requirement of water in the ongoing constructions activities in Gurgaon District, it was becoming difficult to timely schedule the construction activities. The availability of treated water to be used at construction site was thus very limited and against the total requirement of water, only 10-15% of required quantity was available at construction sites.



That, owing to the above said *force majeure* circumstances and reasons beyond the control of the respondent company, it was extremely necessary to extend the intended date of offer of possession mentioned in the allotment letter.

- ix. That for the purpose of ensuring the delivery of the possession, despite Lockdown, the respondent company was seeking permission to resumes construction of the said project. The respondent company got the permission certificate on 01.05.2020 by the municipal corporation of Gurugram, Haryana subject to certain safety restriction and conditions. Therefore, it is humbly submitted that this authority may be pleased to consider the bona fide of the respondent company and distinguish the respondent company from the bad reputé being imparted to real-estate builders. It is pertinent to mention here that the respondent company is extremely committed to complete the phase 2 of the said project in fact super structure/ civil works in all the towers in phase-2 (incl. tower) has already been completed despite all prevailing adversaries, only final finishing work is remaining now.
- x. The respondent company craves leave of this authority to add, amend or alter this reply, if found necessary, at any stage of the proceedings. The respondent company shall submit any documents or details as may be required by this authority. The respondent company also craves leave of this authority to make further submissions at the appropriate stage, if so advised.

E. Jurisdiction of the authority

The authority has complete territorial and subject matter jurisdiction to adjudicate the present complaint for the reasons given below:

E. I Territorial jurisdiction

24. 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

25. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act 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.

F1. Objection regarding jurisdiction of the complaint w.r.t the apartment buyer's agreement executed prior to coming into force of the Act.

26. The respondent submitted that the complaint is neither maintainable nor tenable and is liable to be outrightly dismissed as the apartment buyer's agreement was executed between the complainant and the respondent prior to the enactment of the Act and the provision of the said Act cannot be applied retrospectively.

27. The authority is of the view that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. The Act nowhere provides, nor can be so construed, that all previous agreements will be re-written after coming into force of the Act. Therefore, the provisions of the Act, rules and agreement have to be read and interpreted harmoniously. However, if the Act has provided for dealing with certain specific provisions/situation in a specific/particular manner, then that situation will be dealt with in accordance with the Act and the rules after the date of coming into force of the Act and the rules. Numerous provisions of the Act save the provisions of the agreements made between the buyers and sellers. The said contention has been upheld in the landmark judgment of *Neelkamal Realtors Suburban Pvt. Ltd. Vs. UOI and others. (W.P 2737 of 2017)* which provides as under:

"119. Under the provisions of Section 18, the delay in handing over the possession would be counted from the date mentioned in the agreement for sale entered into by the promoter and the allottee prior to its registration under RERA. Under the provisions of RERA, the promoter is given a facility to revise the date of completion of project and declare the same under Section 4. The RERA does not contemplate rewriting of contract between the flat purchaser and the promoter..."

122. We have already discussed that above stated provisions of the RERA are not retrospective in nature. They may to some extent

be having a retroactive or quasi retroactive effect but then on that ground the validity of the provisions of RERA cannot be challenged. The Parliament is competent enough to legislate law having retrospective or retroactive effect. A law can be even framed to affect subsisting / existing contractual rights between the parties in the larger public interest. We do not have any doubt in our mind that the RERA has been framed in the larger public interest after a thorough study and discussion made at the highest level by the Standing Committee and Select Committee, which submitted its detailed reports."

28. Also, in appeal no. 173 of 2019 titled as **Magic Eye Developer Pvt. Ltd. Vs. Ishwer Singh Dahiya**, in order dated 17.12.2019 the Haryana Real Estate Appellate Tribunal has observed-

"34. Thus, keeping in view our aforesaid discussion, we are of the considered opinion that the provisions of the Act are quasi retroactive to some extent in operation and will be applicable to the agreements for sale entered into even prior to coming into operation of the Act where the transaction are still in the process of completion. Hence in case of delay in the offer/delivery of possession as per the terms and conditions of the agreement for sale the allottee shall be entitled to the interest/delayed possession charges on the reasonable rate of interest as provided in Rule 15 of the rules and one sided, unfair and unreasonable rate of compensation mentioned in the agreement for sale is liable to be ignored."

29. The agreements are sacrosanct save and except for the provisions which have been abrogated by the Act itself. Further, it is noted that the builder-buyer agreements have been executed in the manner that there is no scope left to the allottee to negotiate any of the clauses contained therein. Therefore, the authority is of the view that the charges payable under various heads shall be payable as per the

agreed terms and conditions of the agreement subject to the condition that the same are in accordance with the plans/permissions approved by the respective departments/competent authorities and are not in contravention of any other Act, rules and regulations made thereunder and are not unreasonable or exorbitant in nature. Hence, in the light of above-mentioned reasons, the contention of the respondent w.r.t. jurisdiction stands rejected.

F2. Objection regarding delayed payments

30. Though an objection has been taken in the written reply that the complainant failed to make regular payments as and when demanded. So, it led to delay in completing the project. The respondent had to arrange funds from outside for continuing the project. However, the plea advanced in this regard is devoid of merit. A perusal of statement of accounts shows otherwise wherein like other allottees, the complainant had paid more than 90% of the sale consideration. The payments made by the allottee does not match the stage and extent of construction of the project. So, this plea has been taken just to make out a ground for delay in completing the project and the same being one of the force majeure.

G. Findings on the relief sought by the complainant.

I. **Delay possession charges:** To direct the respondent to give the delayed possession interest to the complainant.

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

"Section 18: - Return of amount and compensation

18(1). If the promoter fails to complete or is unable to give possession of an apartment, plot, or building, —

.....
Provided that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of the possession, at such rate as may be prescribed."

32. Clause 10.1 of the apartment buyer's agreement provides the time period of handing over possession and the same is reproduced below:

"Clause 10.1- The Developer/Company based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said Building/said Apartment within a period of three and half years from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in Clauses 11.1, 11.2, 11.3 and Clause 41 or due to failure of Intending Allottee(s) to pay in time the price of the said Apartment along with other charges and dues in accordance with the schedule of payments given in Annexure F or as per the demands raised by the Developer/Company from time to time or any failure on the part of the Intending Allottee(s) to abide by all or any of the terms or conditions of this Agreement."

33. The apartment buyer's agreement is a pivotal legal document which should ensure that the rights and liabilities of both builders /promoters and buyers/allottee 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 apartment 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 with regard to stipulated time of delivery of possession of the apartment, plot or building, as the case may be and the right of the buyer/allottee in case of delay in possession of the unit. 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.

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

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

Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.

Provided that in case the State Bank of India marginal cost of lending rate (MCLR) is not in use, it shall be replaced by such benchmark lending rates which the State Bank of India may fix from time to time for lending to the general public.

35. 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.
36. 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., 06.10.2021 is 7.30%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.30%.
37. 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;"*

38. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 9.30% by the respondent/promoter which is the same as is being granted to the complainant in case of delayed possession charges.
39. Section 19(10) of the Act obligates the allottees to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. These 2 months' of reasonable time is being given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e., 20.11.2016 till offer of possession of the subject flat (22.02.2018) plus two months i.e., 22.04.2018 as per the provisions of section 19(10) of the Act.
40. On consideration of the documents available on record and submissions made by both the parties regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of



clause 10.1 of the apartment buyer's agreement executed between the parties on 20.05.2013, the possession of the subject apartment was to be handed over within a period of 3 and half years from the date of execution of apartment buyer's agreement i.e., 20.05.2013 which comes out to be 20.11.2016. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent to fulfil its obligations and responsibilities as per the apartment buyer's agreement executed inter-se between the parties within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 20.11.2016 till the offer of the possession ^{after obtaining} at ^{OC} prescribed rate i.e., 9.30 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules and section 19 (10) of the Act.

H. Directions of the authority

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

- X i. { The respondent is directed to pay interest at the prescribed rate of 9.30% p.a. for every month of delay from the due date of possession i.e., 20.11.2016 till the offer of possession i.e.,

~~22.02.2018 plus two months i.e., 22.04.2018 as per section 19 (10) of the Act.~~ *after obtaining O.C.* *8/10*

- ii. The arrears of such interest accrued from 20.11.2016 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the Rules.
 - iii. The respondent is directed to handover the physical possession of the subject unit after obtaining OC from the competent authority.
 - iv. The complainant is also directed to pay the outstanding dues, if any. Interest on the due payments from the complainant and interest on account of delayed possession charges to be paid by the respondent shall be equitable i.e., at the prescribed rate of interest i.e., 9.30% per annum.
 - v. The respondent shall not charge anything from the complainant which is not part of the builder buyer agreement.
42. Complaint stands disposed of.
43. File be consigned to registry.


(Samir Kumar)
Member


(Vijay Kumar Goyal) Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 06.10.2021

Rectified vide order dated 07.09.2022