

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

Complaint no.	:	539 of 2022
Date of filing	:	11.02.2022
First date of hearing:		30.03.2022
Date of decision	:	01.09.2022

1. Sh. Animesh Agarwal S/o Sh. Pramod Kumar Agarwal 2. Smt. Megha Gupra W/o Sh. Animesh Agarwal Both R/o: Dr. Pramod Kumar Agarwal, House no. 318, Nai Basti, Madhuban Compound, Station Road, Pilibhit, Uttar Pradesh- 262001	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:	
Ms. Vridhi 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 allottees 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	06.08.2016 [As per page no. 18 of complaint]
6.	Unit no.	3042 on 4 th floor of tower 03

		[As per page no. 18 of complaint]
7.	Unit area admeasuring	2150 sq. ft. [Super area] [As per page no. 18 of complaint]
8.	Date of apartment buyer agreement	05.09.2016 [As per page no. 16 of complaint] <i>(Note: Inadvertently recorded as 05.09.2016 in proceedings dated 01.09.2022.)</i>
9.	Payment plan	Subvention payment plan [As per page no. 50 of complaint]
10.	Total sale consideration	Rs. 1,27,52,000/- [As per payment plan annexed as schedule I on page no. 47 of complaint]
11.	Amount paid by the complainant	Rs. 1,31,99,961/- [As alleged by the complainant on page no. 13 of complaint]
12.	Possession clause	Clause 6.2 <i>The Developer endeavour to complete the construction of the apartment within 42 months from the date of this agreement (completion date). The company will send possession notice and offer possession of the Apartment to the applicant as and when the company receives the occupation certificate from the competent authority.</i>
13.	Due date of possession	05.03.2020

		[Calculated from the date of agreement i.e., 05.09.2016] <i>(Note: Inadvertently recorded as 17.07.2017 in proceedings dated 01.09.2022.)</i>
14.	Occupation certificate	09.08.2019 [As per page no. 53 of reply]
15.	Offer of possession	09.08.2019 [As per page no. 51 of complaint]

B. Facts of the complaint

3. That the complainants lured by the representation of the respondent through its authorized representative booked a unit in its residential project namely "Tourmaline", Sector 109, Gurugram and paid booking amount of Rs. 5,00,000/- vide cheque no. 500804 dated 21.07.2016 drawn on Axis Bank was issued. At the time of booking, it was promised by the respondent that the possession would be handed over within 42 months from the date of the apartment buyer agreement.
4. That they further paid an amount of Rs. 16,63,292/- to it and thereafter, offered apartment buyer agreement dated 05.09.2016 to them for signing purposes. Having left with no other option as a considerable amount was already paid by them, the complainants agreed to the non-negotiable arbitrary terms of the respondent as there was no option of modifying it or even deliberating it with the builder. Thus, the

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apartment buyer agreement dated 05.09.2016 was duly executed between the parties.

5. That the complainant were subjected to unethical trade practice as well as subject of harassment, possession clause of the said agreement, penalty clause on failure, many hidden charges which were forcedly imposed on the buyer's at the time of possession as tactics and practice used by builder guise of a biased, arbitrary and discriminatory.
6. That the complainants have already paid Rs. 1,31,99,661/- which is more than 100% of total basic sale consideration, in a time bound manner against total basic consideration of the said apartment being Rs. 1,17,95,750/-.
7. That in August 2019, they received a letter dated 09.08.2019 vide which the respondent informed about receipt of the occupation certificate and demanded the payment of the outstanding dues of Rs. 29,66,803/-. The complainants immediately made all the payments due and requested it to hand over the possession. However, despite regular follow ups, it failed to comply with its contractual obligations as conferred upon it vide apartment buyer agreement and even failed to hand over the actual possession to the complainant till date.
8. That as per clause 6 and 7 of the agreement, the respondent was liable to offer the actual possession of a said apartment within 42 months of

the agreement and thereafter, issue notice for possession within 21 days of receipt of the occupation certificate. However, till date, it has failed to hand over the actual possession of the apartment to them.

9. That as per section 19 (6) the Act of 2016, they have fulfilled their responsibility in regard to making the necessary payments in the manner and within the time specified in the said agreement. Therefore, they are not in breach of any of its terms of the agreement. The builder in last 2 years and many times made false promises for possession of the apartment and indulged in all kinds of tricks and blatant illegality in booking and drafting of apartment buyer agreement with a malicious and fraudulent intention causing deliberate and intentional huge mental and physical harassment of the complainant and their family. More so when their father was sick and they want to shift him to Gurugram for his proper treatment but delayed due to unfair trade practice of the respondent. Thus, the complainants are eminently justified in seeking possession of apartment on immediate basis along with delayed penalty.
10. That keeping in view the malpractices and half-hearted promises of the respondent and trick of extract more and more money from their pocket seems bleak and the same is evident from the irresponsible and desultory attitude and conduct of the respondent, consequently



injuring the interest of the buyers including the complainants who have spent their entire hard earned savings in order to buy this apartment and stands at a crossroads to nowhere. The inconsistent and lethargic manner, in which the respondent conducted its business and the lack of commitment in handing over the apartment has caused them great financial and emotional loss.

C. Relief sought by the complainants:

11. The complainants have sought following relief:
 - i. Direct the respondent to immediately 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.
 - iii. Direct the respondent to pay cost of litigation.
12. On the date of hearing, the authority explained to the respondent/promoter about the contraventions 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:

13. 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.

14. That the complainants after checking the veracity of the project namely, 'ATS Tourmaline', Sector 109, Gurugram had 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. It is submitted that based on the application, the respondent company made the allotment of the unit bearing no. 3042 on 4th floor of tower 3.
15. That the buyer's agreement was executed on 05.09.2016 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 05.09.2016 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.
16. 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 14.09.2016. 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.

17. That as per clause 4 of the buyer's agreement, the sale consideration was agreed to Rs. 11,17,95,750/- and the same was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. 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.
18. 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.
19. 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 beyond the control of respondent and which 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 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 be 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.

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

20. 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.
21. 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.
22. 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



23. 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.

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

25. The respondent contended that as per the terms & conditions of the agreement 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.

26. 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

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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."

27. 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.

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28. 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, the 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. 1,31,99,961/- 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. 000600000010557 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:

29. 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 apartment buyer's agreement was executed between the parties on 05.09.2016 and as per terms and conditions of the said such buyer's agreement dated 05.09.2016, the due date of handing over of possession was 05.03.2020. 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. 1,31,99,961/- against total consideration of Rs. 1,27,52,000/- which is more than total sale consideration of allotted unit, 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.

G. Findings regarding relief sought by the complainants.

30. Relief sought by the complainants:

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

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31. 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.
32. 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.
33. 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. 29,66,803/- payable by 30.08.2019. The unit was offered after obtaining OC, which also implies that the same is of 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.
34. Such offer of possession was accompanied with demand of Rs. 29,66,803/-. As per payment plan annexed on page no. 50 of complaint, an amount of Rs. 26,75,823/- (including BSP, maintenance deposit, power back up, EDC/IDC and excluding running maintenance) was

payable at the time of offer of possession. But the complainants contended that they have paid the complete amount towards consideration of allotted unit and wrote various mails annexed as annexure 53 from page no. 53-62 of complaint. The authority observes that the said demand raised by the respondent is as per apartment buyer's agreement dated 05.09.2016 and therefore, valid. The complainants further submitted that the respondent has yet not handed over the possession of the allotted unit.

35. 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.
36. 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.

37. 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, -

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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

38. As per clause 6.2 of the flat buyer's agreement dated 05.09.2016, the possession of the subject unit was to be handed over by 05.03.2020. Clause 6.2 of the buyer's agreement provides for handover of possession and is reproduced below:

"As per clause 6.2: The Developer endeavour to complete the construction of the apartment within 42 months from the date of this agreement (completion date). The company will send possession notice and offer possession of the Apartment to the applicant as and when the company receives the occupation certificate from the competent authority."

39. 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.

40. **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.

41. 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.

42. 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%.
43. 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.
44. However, in the instant complaint, the respondent has already offered the possession of the allotted unit on 09.08.2019 before due date of handing over of possession i.e. 05.03.2020. Hence, no case of delayed possession charges is made out. However, despite several reminders

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and follow ups by the complainants, the respondent has failed to handover the possession the allotted unit. Now, the issue arises before the authority is that up to which date, the delay possession charges 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. 1,31,99,961/- which is more than total consideration of Rs. 1,27,52,000/- whereas 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 acts 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 complainants and on the other hand, the complainants 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

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- in the present case, the respondent has offered the possession of the unit on 09.08.2019. The fact cannot be ignored that the complainants-allottees 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.
45. 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.
46. On consideration of the circumstances, the evidence and other record and submissions made by the complainants 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 buyer's agreement executed between the parties on 05.09.2016, possession of the booked unit was to be delivered within a period of 42 months from the date of execution of the agreement, which comes out to be 05.03.2020.
47. The authority hearing the parties at length and to balance the rights of both the parties, comes to a conclusion that the respondent has already offered the possession of the allotted unit on 09.08.2019 before due date of handing over of possession i.e. 05.03.2020. Hence, no case of delayed possession is made out. In view of relief sought no. 1, 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. Failing which non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent shall be established and accordingly, the complainants shall be entitled for delayed possession charges @10% p.a. w.e.f. from due date of possession i.e. 05.03.2020 till actual handing over of possession as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

G. III Direct the respondent to pay cost of litigation.

48. The complainants are seeking relief w.r.t. compensation in the above-mentioned reliefs. *Hon'ble Supreme Court of India in civil appeal nos. 6745-6749 of 2021 titled as M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of Up & Ors.*, has held that an allottee is entitled to claim compensation & litigation charges under sections 12,14,18 and section 19 which is to be decided by the adjudicating officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the adjudicating officer having due regard to the factors mentioned in section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, for claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate

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complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the authority:

49. 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 to the complainants complete in all aspects as per specifications of buyer's agreement within 2 weeks from date this order i.e. 01.09.2022, failing which non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent shall be established and accordingly, the complainants shall be entitled for delayed possession charges @10% p.a. w.e.f. from due date of possession i.e. 05.03.2020 till actual handing over of possession as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.
- iii. 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.

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

50. Complaint stands disposed of.

51. 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

HARERA
GURUGRAM