BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.	**:**	**2143 of 2021**
Complaint filed on	**:**	**19.04.2021**
Order reserved on	**:**	**10.03.2023**
Order pronounced on	**:**	**02.05.2023**

1. Mr. Vijay Chaturvedi
2. Mr. Sandeep Sharma

Both RR/o: G-703, Bestech Park View Grand SPA,
Sector- 81, Gurugram - 122004 **Complainants**

Versus

M/s TS Realtech Private Limited.
Registered Office at: - E-26, LGF, Panchsheel Park,
New Delhi - 110017 **Respondent**

CORAM:
Shri Ashok Sangwan **Member**

APPEARANCE WHEN AGRUED:
Shri Sukhbir Yadav Advocate for the complainants
Shri JK Dang Advocate for the respondent

ORDER

1. The present complaint has been filed by the complainant/allottees in 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. Project and unit related details

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

Sr. No.	Particulars	Details
1.	Name of the project	"IRIS Broadways", Sector – 85-86, Gurugram
2.	Project area	2.8 acres
3.	Nature of the project	Commercial colony
4.	DTCP license no. and validity status	40 of 2012 dated 22.04.2012 valid up to 21.04.2025
5.	Name of licensee	T.S. Realtech
6.	RERA Registered/ not registered	Registered vide no. 168 of 2017 dated 29.08.2017
7.	RERA registration valid up to	31.12.2021
8.	Unit No.	A-307, Super area – 804 sq. ft. (Page no. 58 of the complaint)
9.	Date of allotment letter	12.07.2013 (Page no. 52 of the complaint)
10.	Date of builder buyer agreement	17.09.2013 (As per page 23 of complaint)

11.	Possession clause	**11.1 Possession** If for any reasons other than those given in clause 11.1, the company is unable to or fails to deliver possession of the said unit to the allottees within ***forty two months from the date of application or within extended period or periods under this agreement***, then in such case, the allottees shall be entitled to give notice to the company, within ninety days from the expiry of said period of forty two months or such extended periods, as the case may be, for terminating this agreement. (Page no. 65 of the complaint)
12.	Due date of possession	17.06.2017 (Calculated from the date of space buyer's agreement i.e., 17.09.2013 + 90 days grace period)
13.	Total sale consideration	Rs. 63,62,410/- (As per statement of accounts provided on page 61 of reply)
14.	Total amount paid by the complainants	Rs. 60,92,554/- (As per statement of accounts provided on page 61 of reply)

15.	Date of environment clearance	15.04.2014 (As per page 40 of the reply)
16.	Occupation certificate	29.03.2019 (Page no. 56 of the reply)
17.	Offer of possession	12.04.2019 (Page no. 79 of the complaint)

B. Facts of the complaint

3. The complainants have made following submissions in the complaint:

i. That in the first week of January 2013, the complainant/allottees, received a marketing call from a real estate agent, representing himself as an authorized agent of the respondent and marketed a commercial project namely "IRIS Boardway" situated at Sector – 85, Gurugram and asked to book a commercial unit in the project. They visited the office and project site of the respondent and consulted the marketing staff and office bearers of the respondent. The marketing staff of the respondent allured the complainants with proposed specifications and assured that possession of the unit would be handed over within 3 years from the date of booking. The respondent gave them a brochure and a pre-printed application form.

ii. That, believing on the representations and assurances of respondent, they booked a commercial unit bearing no. 307 on 3rd floor in Tower A having a super area of 804 sq. Ft. in the said

project and issued a cheque of Rs. 5,00,000/- on 10.01.2013 and signed a pre-printed application form. The commercial unit was booked for a total sale consideration of Rs. 63,62,410/- under the construction link plan. On 12.07.2013, the respondent issued a letter of allotment, confirming to the allotment of commercial unit detailed above.

iii. That on 17.08.2013, a pre-printed, unilateral, arbitrary buyer's agreement was executed inter-se both the parties. According to clause no. IV and 10.2 of BBA, the respondent was to give possession of the unit within 42 months from the date of receipts of all permissions and commencement of construction. The respondent raised the 3rd demand on "*commencement of Excavation or 120 days from the date of booking, whichever is later*" on 28.08.2013. It shows that the respondent has all the requisite approval till that date, therefore the due date of possession was 28.02.2017.

iv. That on 12.04.2019, the respondent sent a letter for the offer of possession. The said letter was for information purposes as it was not containing any demand to be paid at the time of taking the possession. For the first time on 20.05.2019, the respondent raised the final demand for the offer of possession and asked them to remit Rs.5,24,947/- and issued a statement of account. As per the demand letter, the respondent asked them to pay Rs.47,436/-

under the head sinking fund @ Rs.50/- per sq. ft. and Rs.94,872/- under the head electric connection charges @ Rs.100/- per sq. ft. The said demand was over and above the agreed sale consideration and was not as per the BBA. It is further germane that as per the statement of account the complainants have paid Rs.60,92,554/- i.e., 95.54% of the total sale consideration of the unit.

v. That on 08.10.2020, the respondent issued a fresh statement of account by crediting Rs.76,380/- in the statement of account, on account of delay in possession.

vi. That several emails were exchanged between the parties pertaining to demand and possession of the unit. That on 13.06.2019, the respondent sent an email and asked them to remit Rs.4,39,401.90/- by issuing a PDC dated 10.07.2019. That after receiving the said email the complainants visited the site office of the respondent and asked for a tentative possession date, as the unit was not ready for habitation, but there was no direct reply from the respondent, therefore the complainants sent an email on 26.06.2019 and asked for tentative possession date, but there was no reply from the respondent, therefore the complainants sent a reminder email on 17.07.2019, 19.07.2019 and 08.08.2019. That the respondent did not reply on the email to commit a date for possession of the unit but sent an email on 08.08.2019 and asked to meet on 09.08.2019 at 1:30 pm. That on 06.11.2019, the complainants sent an email to the respondent and refused to offer of the respondent for hotel least and retreated that he is interested to use the property for own consumption and express his

willingness to pay the remaining payment at the time of completion of the project and again asked for the final date of completion of the unit. Since there was no reply from the respondent the complainants sent another email on 15.02.2020 and alleged that "*I am surprised to receive the reminder letter for* ***Final Payment against the payment of OfficeSpace no 307 at IRIS Broadway****. In the attached letter there is an interest component as well. I am continuously follow up for the* ***possession of the property but instead of several reminders*** *and meetings no date has been given for the final possession. Infact I have visited the site and understand that it would take at least next 6-9 months to complete the interior and make it operational. As per the contract if the possession of the property has not been made within the prescribed time then there is a penalty clause in the agreement but seems there is an error in the computation of the amount therefore, requesting you to recompute the same and send the revised computation. In addition to that please let me know the final date of possession for internal use.* ***As communicated earlier over the email /meetings, please note that we would not like to lease our property to any Hotel chain as suggested by Trehan Management*** *Therefore, requesting you to send the date of final possession along with the revised actual calculation sheet. I am asking the information for last 7-8 months but till now no information has been provided Please appreciate that possession of the property has already been delayed by more than 3years. As per contract, we would release the payment post receipt of aforesaid computation sheet and date of final possession*". That thereafter, the complainant received a call from the office of the Respondent from Mr. Rakesh, who express their concern to buy back the property. Hence the Complainants sent an email and stated that "Dear *Rakesh, As discussed over the call on 17th February, we understand that*

Trehan Builders desire to buy back the property and inform along with ***rates and timelines within 6-7 days.*** *Would request you to provide the same at earliest, accordingly, would take a decision. Please let me know the way forward in this regard.*". That the respondent (through Mr. Rakesh Bhatia) sent an email to the complainant stating that "*As per the below trail email, this is to inform you that we are in the process of signing the lease deed. We are planning to open the sales of SOHO suits shortly. Please allow us some time to look into this and I will get back to you at the earliest*". It is pertinent to mention here that on one side, the respondent was requesting to grant the time and did not give the final date of handing over the possession of the unit and on another side, it kept sending demands along by applying interest on demand. That on 12.05.2020, 22.10.2020, 25.10.2020, 13.03.2017, 15.03.2021, 21.03.2021, 23.03.2021 & 09.04.2021 respectively, the complainants sent emails and asked for possession of the unit, but the respondent was adamant not to give the possession of the unit and making pressure to lease out the unit as per its terms and conditions.

vii. That on 11.04.2021, the complainants visited the project site and requested to see the unit, but the officials of the respondent have refused to open it. It is pertinent to mention here that finishing work on the third floor was not yet completed. Since March 2017, the complainants are regularly requesting the respondent to give

possession of the unit, but it failed to hand over the possession of the unit.

viii. That due to the acts of the above and the terms and conditions of the builder buyer agreement, the complainants have been unnecessarily harassed mentally as well as financially. So, the opposite party is liable to compensate the complainants on account of the aforesaid act of unfair trade practice.

ix. That there are a clear unfair trade practice and breach of contract and deficiency in the services of the respondent party and much more a smell of playing fraud with the complainants and others and is prima facie clear on its part which makes it liable to answer this authority.

C. Relief sought by the complainants

4. The complainants have filed the present compliant for seeking following relief:

i. Directing the respondent party to refrain from charging Rs.47,436/- under the head sinking fund @ Rs.50/- per sq. ft. and Rs. 94,872/- under the head electric connection charges @ Rs.100/- per sq. ft.

ii. Direct the respondent party to pay the delayed possession interest from the due date of possession till handing over the possession of the unit.

iii. Direct the respondent party to hand over the possession of the unit (complete in all respect).

iv. Direct the respondent party to refrain from giving effect to unfair clauses of BBA.

5. 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 and to plead guilty or not to plead guilty.

D. Reply by the respondent

6. The respondent has raised certain preliminary objections and has contested the present complaint on the following grounds:

i. That the complaint is liable to be dismissed as it is barred by the principles of delay and laches. The complainants had booked unit on 17.09.2013 with the respondent. They had carried out inspection of the documents in respect of the said project and were duly informed about the completion date of the said unit and other obligations of the complainants at the time of making application for booking the said unit. The complainants now in 2021 after passage of 8 years from the date booking application form cannot be allowed to raise the flimsy and frivolous objections at such juncture where the construction of the unit is completed.

ii. That from the perusal of the aforementioned provisions and/or the rules and conjoint reading of the same, it is evident that the

"agreement for sale" that has been referred to under the provisions of 2016 Act and the rules of 2017, is the "agreement for sale" as prescribed in the rules of 2017. Apparently, in terms of section 4(1), promoter is required to fill an application to the 'authority' for registration of the real estate project in such form, manner, within such time and accompanied by such fee as may be prescribed. The term 'prescribed' has been defined under section 2(z)(i) to mean prescribed by rules made under the Act. Further Section 4(2)(g) of 2016 Act provides that a promoter shall enclose, along with the application referred to in section 4(1), a proforma of the allotment letter agreement for sale, and conveyance deed proposed to be signed with the allottees. section 13(1) of 2016 Act inter-alia provides that a promoter shall not accept a sum more than 10% of the cost of the office space, plot or building as the case may be, as an advance payment or an Application fee, from a person, without first entering into a written agreement for sale with such person and register the said agreement for sale, under any law for the time being in force sub-section2 of section 13, inter alia provides that the agreement for sale referred to in sub-section (1) shall be in such form as may be prescribed and shall specify certain particulars as mentioned in the said sub-section. Rule 8 of the rules of 2017 categorically lays down that the agreement for sale shall be as per Annexure-A.

iii. That it is a matter of record and rather a conceded position that no such agreement, as referred to under the provisions of 2016 Act and the rules of 2017, has been executed between the respondent company and the complainant. Rather, the agreement that has been referred to, for the purpose of getting the adjudication of the complaint, though without jurisdiction, is the space buyer's agreement, executed much prior to coming into force of 2016 Act. The adjudication of the complaint for compensation, as provided under Section-12,14, 18 and 19 of 2016 Act, has to be in reference to the agreement for sale executed in terms of 2016 Act and the rules of 2017 and no other agreement. This submission of the respondent inter alia, finds support from reading of the provisions of 2016 Act as well as rules of 2017, including the submissions.

iv. That the respondent has obeyed the legal obligations and also complied with laws, and it had registered the said project under the provisions of the Act of 2016 vide registration No. 168 of 2017 which is valid up to 31.12.2021. It shows that the respondent had since from its inception always acted as per the policy of law, as well as complied with the legal obligations. The project of the respondent is in two phases i.e., phase I, II. The Phase I of the project includes block-A, and phase-II includes block- B and C.

v. That the complainants purchased a SOHO (shop office home office) commercial unit in the said project bearing No. 307 in block-A. The

falls under phase-I against which the occupation certificate has been obtained on 29.03.2019.

vi. That the respondent had started the construction work after getting all the approvals from the concerned authorities. The said project had got the NOC for construction, NOC from Airport, NOC from Aravali, NOC from MOEF environmental clearance, NOC for water, NOC for fire, NOC for lift, NOC for electricity, approval of sanction plan, structural plan, zoning plan, and sanction load of electricity-DG-HT, etc. The license of the respondent i.e., license No. 40 of 2012 was also renewed by the DTCP dated 18.03.2021 which is now valid up to 21.04.2025.

vii. That there has been delay in handing over the possession due to sudden demise of the Managing Director (Promoter) Sh. Jai Kumar Trehan on 30.12.2013, aware the construction work was stopped at that time for a certain period of time. There was another substantive reason for delay which was beyond the control of the respondent. At the time of demonetization in the year 2016 i.e., since November 2016, the respondent company have suffered to arrange labour for construction. Therefore, there was delay in handing over the possession. The reasons stated herein were beyond the control of the respondent and thus, qualify for *Force Majure* clause of the agreement.

viii. That the allotted unit of the complainants falls under phase-I which was complete in every respect. Further, the respondent had got occupation certificate from the DTCP, Haryana for block-A (phase -I) of the said project vide letter dated 29.03.2019. The said phase is already completed in all respect. Moreover, the respondent has offered the possession to the complainant on 12.04.2019. However, they were not interested to clear the outstanding dues for the said allotted unit, thus, were defaulting under the provisions of the Act, 2016.

ix. That the complainants have failed to fulfil the obligations towards the payment against the said units within the time period. Despite various reminders, they failed to make the payment on time. They have paid an amount of Rs.60,94,554/- (excluding ST/GST) out of the total consideration of Rs.65,63,410/. The respondent is raising demand since 2019 for the outstanding dues against the complainants and which has not been paid by them till date. Further, the complainants are defaulter in making the payments and have not complied with the terms and conditions of the space buyer's agreement. They have violated the provision of the Act, 2016. As per section 19(6) of the Act, 2016, the complainants are responsible to make necessary payments in time.

7. 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 on the basis of these undisputed documents.

E. Jurisdiction of the authority

8. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E.I Territorial jurisdiction

9. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, Haryana, 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

10. Section 11(4)(a) of the Act provides that the promoter shall be responsible to the allottee as per agreement for sale. Section 11(4)(a) is reproduced as hereunder:

> ***Section 11***
>
> .....
>
> *(4) The promoter shall-*
>
> *(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.

11. So, in view of the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the 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

F. I Objection regarding jurisdiction of authority w.r.t. agreement for sale executed prior to coming into force of the Act.

12. The respondent has raised objection that authority is deprived of the jurisdiction to go into the interpretation of, or rights of the parties inter-se in accordance with the booking application form executed between the parties and no agreement for sale as referred to under the provisions of the Act or the said rules has been executed inter se parties. The authority is of the view that 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. (Supra) decided on 06.12.2017 and*** 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."*

13. 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."*

14. 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, statutes, instructions, directions issued thereunder and are not unreasonable or exorbitant in nature.

G. Findings on the reliefs sought by the complainants

G. I Direct the respondent party to refrain from charging Rs.47,436/- under the head sinking fund @ Rs.50/- per sq. ft. and Rs.94,872/- under the head electric connection charges @ Rs.100/- per sq. ft.

15. As per statement of account on page no. 81 of the complaint, the respondent has charged an amount of Rs.47,436/- towards sinking funds, and Rs.94,872/- /- towards electric connection charges.

16. As per clause 14.3 and 14.5 of agreement dated 17.09.2013, the complainants shall pay applicable charges on account of electric

connection charges and sinking fund. The said clause of the agreement is reproduced hereunder: -

14.3 If at any time after the execution of the conveyance deed, the Company/Maintenance Agency decides to apply for and thereafter receives permission from Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVN) or from any other Body/ Commission/ Regulatory/ Licensing Authority constituted by Government of Haryana for such purpose, to receive and distribute bulk supply of electrical energy in the Building, then the Intending Allottee undertakes to pay on demand to the Company/Maintenance Agency proportionate share as determined by the Company/Maintenance Agency of all deposits and charges like fixed connection charges, Advance Consumption deposit. expenditure on independent feeder, share cost of sub-station etc. paid/payable by the Company/Maintenance Agency to Dakshin Haryana Bijli Vitran Nigam Ltd. (DHBVN)/any other Body/ Commission/ Regulatory/ Licensing Authority constituted by the Government of Haryana, the total of such payment shall constitute a onetime charge as well as advance consumption deposit. The advance consumption deposit shall be refundable whenever the Intending Allottee surrenders the electrical energy supply connection. It is clarified that the Company/Maintenance Agency shall apply for and obtains bulk supply of electricity from DHBVN or any other Authority. Further the Intending Allottee agrees that the Company/Maintenance Agency shall be entitled to withhold electricity supply to the said Unit till the Company/Maintenance Agency receives fall payment of such deposits and charges. Further in case of bulk supply of electrical energy, if obtained by the Company/Maintenance Agency, the Intending Allottee agrees to abide by all the conditions of sanction of bulk supply including but not limited to waiver of the Intending Allottee's rights to apply for individual/ direct electrical supply connection directly from DHBVN or any other Body responsible for supply of electrical energy. The Intending Allottee agrees to pay any increase in the deposits, charges for bulk supply of electrical energy as may be demanded by the Compacted to time. The Intending Allottee shall also execute an electricity agreement with the Company as for draft already seen by the Intending Allottee and consented to by him/it. The charges for electricity supply generated from other sources like D.G. Sets, etc. shall be payable at rates applicable from time to time depending upon costs.

14.5 That as and when any Plant & Machinery within the Building/Plot, as the case may be, including but not limited to DG sets, electric sub-stations, pumps, firefighting equipment, any other plant/equipment of capital nature etc. require replacement, up gradation, additions etc. the cost thereof shall be contributed by the Intending Allottee and all the intending allottees in the Building/said Unit, as the case may be on pro-rata basis (i.e. in proportion to the Super Area of the said Unit to the total Super Area of all the Unit in the Building, as the case may be). The

Company/ Maintenance Agency shall have the sole authority to decide the necessity of such replacement, up gradation, additions etc. including its timings or cost thereof and the Intending Allottee agrees to abide by the same. For the said purpose for the time being the Intending Allottee shall keep deposited with the Company a sum of Rs. ***calculated @ Rs. 50 per sq. ft. which amount shall be treated as Sinking Fund and the Second Party agrees to replenish the same and /or pay additional Sinking Fund if so, required for meeting the aforementioned purpose upon receipt of intimation from the First Party which shall be paid without raising any objection and the decision of the. Company/Maintenance Agency*** *in this regard shall be final and binding the sinking fund shall be kept deposited by the Company/Maintenance Agency in a separate designated account which along with the interest received on such deposit to be used exclusively for the aforementioned purposes.*

17. It is to be noted that as per statement of account issued by the respondent along with offer of possession, it is charging sinking funds @ Rs.50/- per sq. ft. and the same was in consonance of clause 14.5 of agreement dated 17.09.2013. Therefore, as per clause 14.5 of the buyer's agreement, the complainants have agreed to pay sinking funds. In view of the same, the respondent is right in charging Rs.47,436/- on pretext of sinking funds. Further, the authority has gone through the statement of account annexed with the offer of possession, it is observed that the respondent/promoter has separately charging IFMS @ 100/- sq. ft. apart from sinking fund @ 50/- sq. ft. However, the respondent has already charged for IFMS funds. So, they have not liable to take charges under the head of sinking funds as the purpose of collecting both the amounts the purpose is same as both the aforesaid charges are charges to meet the exigencies arising in future and to meet

demand against such capital expenditures. So, it is not only unethical on the part of the developer but also illegal.

18. Further, it is to be noted that the said clause also deals with charges applicable on consumption basis but there is no specific clause dealing with one-time charges dealing with installation charges, etc. The promoter would be entitled to recover the actual charges paid to the concerned departments from the complainant/allottees on pro-rata basis on account of electricity connection charges, i.e., depending upon the area of the flat allotted to them vis-à-vis the area of all the flats in this particular project. The complainants would also be entitled to proof of such payments to the concerned departments along with a computation proportionate to the allotted unit, before making payments under the aforesaid heads. The respondent is directed to provide specific details with regards to these charges.

G. II Direct the respondent party to pay the delayed possession interest from the due date of possession till handing over the possession of the unit.

19. 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. Proviso to section 18(1) 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."

20. Clause IV of the space buyer's agreement provides for time period for handing over of possession and is reproduced below:

> "**11.1 Possession** If for any reasons other than those given in clause 11.1, the company is unable to or fails to deliver possession of the said unit to the allottees within forty two months from the date of application or within extended period or periods under this agreement, then in such case, the allottees shall be entitled to give notice to the company, within ninety days from the expiry of said period of forty two months or such extended periods, as the case may be, for terminating this agreement.

21. At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and the complainant not being in default under any provisions of this agreement and compliance with all provisions, formalities and documentation as prescribed by the promoter. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottee that even a single default by the allottee in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottee and the commitment time period for handing over possession loses its meaning. The incorporation of such clause in the buyer's agreement by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottees of

their right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

22. **Admissibility of grace period:** As per clause 11.1 of space buyer's agreement dated 17.09.2013, the respondent-promoter proposed to handover the possession of the said unit within a period of 42 months along with grace period 90 days as grace period. The said clause is unconditional and provides that if the respondent is unable to complete the construction of the allotted unit within stipulated period of 42 months, then a grace period of 90 days shall be allowed to the respondent. The authority is of view that the said grace period of 90 days shall be allowed to the respondent being unconditional. Therefore, as per clause 11.1 of the space buyer's agreement dated 17.09.2013, the due date of possession comes out to be 17.06.2017.

23. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges at the prescribed rate of interest. 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.

24. The legislature in its wisdom in the subordinate legislation under 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.

25. Taking the case from another angle, the complainant-allottees were entitled to the delayed possession charges/interest only at the rate of Rs.5/- per sq. ft. per month of the super area as per clause 11.1 of the buyer's agreement for the period of such delay; whereas, as per clause 8 of the buyer's agreement, the promoter was entitled to interest @ 24% per annum at the time of every succeeding instalment from the due date of instalment till date of payment on account for the delayed payments by the allottee. The functions of the authority are to safeguard the interest of the aggrieved person, may be the allottees or the promoter. The rights of the parties are to be balanced and must be equitable. The promoter cannot be allowed to take undue advantage of his dominant position and to exploit the needs of the home buyer's. The

authority is duty bound to take into consideration the legislative intent i.e., to protect the interest of the consumers/allottees in the real estate sector. The clauses of the buyer's agreement entered into between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex-facie one-sided, unfair and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These type of discriminatory terms and conditions of the buyer's agreement will not be final and binding.

26. 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., 02.05.2023 is 8.70%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

27. **Rate of interest to be paid by the complainants in case of delay in making payments-** 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;"

28. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.70% by the respondent/ promoter which is the same as is being granted to the complainant in case of delayed possession charges.

29. On consideration of the documents available on record and submissions made by the parties regarding contravention as per 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 IV of the space buyer's agreement executed between the parties on 17.09.2013, the possession of the subject flat was to be delivered within a period of 42 months from the date of receipt of application. The due date of possession calculated from the date of space buyer's agreement i.e., 17.09.2013 plus 90 days grace period which comes out to be 17.06.2017. The occupation certificate of the project was granted by the concerned authority on 29.03.2019 and thereafter, the possession of the subject unit was offered to the complainants on 12.04.2019. Copies of the same have been placed on record. The authority is of the considered view that

there is delay on the part of the respondent to offer physical possession of the subject unit and it is failure on part of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 17.09.2013 to hand over the possession within the stipulated period.

30. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 29.03.2019. The respondent offered the possession of the unit in question to the complainants only on 12.04.2019. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession. Therefore, in the interest of natural justice, the complainants should be given 2 months' time from the date of offer of possession. These 2 months' of reasonable time is being given to them keeping in mind that even after intimation of possession practically they 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 till the expiry of 2 months from the date of offer of possession (12.04.2019) which comes out to be 12.06.2019.

31. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. As such, the complainants are entitled to delayed possession at prescribed rate of interest i.e., 10.70 % p.a. w.e.f. 15.10.2017 till 12.06.2019 i.e., expiry of 2 months from the date of offer of possession (12.04.2019) as per provisions of section 18(1) of the Act read with rule 15 of the rules.

G.III Direct the respondent party to hand over the possession of the unit (complete in all respect).

32. The respondent/promoter after obtaining the occupation certificate on 29.03.2019, offered the possession of the subject unit to the complainants on 12.04.2019. Section 19(10) of the Act of 2016 lays down a mandate over the complainant-allottees to take the possession of the allotted unit within two months from date of obtaining occupation certificate and the fact cannot be ignored that the respondent has already offered the possession of the allotted unit to them.

33. Further, the Authority observes that the allottees have already paid the amount of Rs.60,92,554/- against the total sale consideration of Rs.63,62,410/- to the respondent. The complainants have already paid more than 95% of the total amount and the balance amount is payable on at the time of offer of possession. The respondent/promoter has offered the possession on 12.04.2019 after obtaining occupation

certificate along with pending dues. As per section 19(6) of Act lays down an obligation on the allottee(s) to make timely payments towards consideration of allotted unit. As per documents available on record, the complainants have paid all the installments as per payment plan duly agreed upon by the complainants while signing the agreement and the same is evident from statement of account dated 20.05.2019 on page no. 81-82 of the complaint. The complainants are directed to pay the remaining dues after adjustment of delay possession charges and less the amount already adjusted, if any within 30 days from date of this order and thereafter, to take the physical possession of same.

G. IV Direct the respondent party to refrain from giving effect to unfair clauses of BBA.

34. A buyer's agreement is a vital document that defines rights and obligation of the parties. Thus, it is of utmost important that the agreement must be drafted fairly. Whereas only specific provisions are to be declared void on account of being arbitrary, unjust or unfair. In present case, the complainants have not mentioned any one-sided clause particularly in the complaint which are be declared unfair and unilateral. Hence, no direction to this effect can be issued.

H. Directions of the authority

35. 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):

i. The respondent is directed to pay the interest at the prescribed rate i.e., 10.70% per annum for every month of delay on the amount paid by the complainants from due date of possession i.e., 15.10.2017 till 12.06.2019 i.e., expiry of 2 months from the date of offer of possession (12.04.2019). The arrears of interest accrued so far shall be paid to the complainants within 90 days from the date of this order as per rule 16(2) of the rules.

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

iii. The respondent is directed to issue a fresh statement of account after adjusting delay possession charges within 15 days from date of this order.

iv. The respondents are directed to pay arrears of interest accrued, if any after adjustment in statement of account; within 90 days from the date of this order as per rule 16(2) of the rules.

v. The complainants are directed to pay outstanding dues, if any, after adjustment of interest for the delayed period and to take the possession of the subject unit within two months from date of this order.

vi. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e.,

10.70% by the respondents/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.

vii. The respondent shall not charge any amount on account of sinking fund as per reason detailed above in para 17 above.

36. Complaint stands disposed of.

37. File be consigned to registry.

Dated: 02.05.2023

(Ashok Sangwan)
Member
Haryana Real Estate
Regulatory Authority,
Gurugram