



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

Complaint no. : 3419 of 2021
Date of filing : 06.09.2021
Date of decision : 28.03.2023

1. B. Gangar S/o Sh. Chhotu Gangar
2. Saleem Gangar S/o Sh. B. Gangar
both RR/o: -1340, Sector-17-C, Gurugram,
Haryana-122001

Complainants

Versus

M/s Vatika Limited
Regd. Office at: A-002, INXT City Centre, ground floor,
block A, sector 83,
Vatika India Next, Gurugram-122012, Haryana.

Respondent

CORAM:

Shri Vijay Kumar Goyal
Shri Sanjeev Kumar Arora

Member
Member

APPEARANCE:

Sh. B Gangar
Sh. Harshit Batra

Complainant in person
Advocate for the respondent

ORDER

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

A. Unit and project related details



2. The particulars of unit details, 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.No.	Heads	Information
1.	Project name and location	"Vatika Town Square" at sector 82, Vatika India Next, Gurgaon, Haryana.
2.	Nature of the project	Commercial complex
3.	Project area	1.60 acres
4.	DTCP License	113 of 2008 dated 01.06.2008 valid upto 31.05.2018 71 of 2010 dated 15.09.2010 valid upto 14.09.2018 62 of 2011 dated 02.07.2011 valid upto 0.07.2024 76 of 2011 dated 07.09.2011 valid upto 06.09.2017
5.	RERA registered/ not registered	40 of 2021
6.	RERA Registration valid upto	31.03.2022
2.	Date of allotment	N/A
3.	Date of buyer agreement	05.10.2015 (Page 50 of complaint)
4.	Unit no.	254, 1 st floor, block A admeasuring 580 sq.ft. (Page 52 of complaint)
5.	New area	635 sq.ft. (page 83 of complaint)
6.	Possession clause	17.Handing over possession of the commercial unit <i>The Developer based on its present plans and estimates and subject to all just exceptions, contemplates to complete construction of the said unit within a period of 48 months from the date of execution of this Agreement unless there shall be delay or there shall be failure due to reasons mentioned in this agreement or due to failure of buyer(s) to pay in time the price of the said commercial unit along with all other charges and dues in accordance with the schedule of payments.</i>



		<i>(Emphasis supplied)</i>
7.	Due date of possession	05.10.2019 [Due date of possession calculated from the date of BBA]
8.	Total sale consideration	Rs. 60,54,090/- as per SOA dated 22.09.2021 (page 41 of reply)
9.	Amount paid by the complainant	Rs. 30,18,389/- as per SOA dated 22.09.2021 (page 41 of reply)
10.	Occupation certificate	17.02.2022 (As submitted by counsel for respondent during proceedings dated 28.10.2022)
11.	Intimation of offer of possession	15.07.2019 (page 83 of complaint)
12.	Notice for termination	24.02.2021 (page 35 of reply)
13.	Letter for cancellation	27.07.2021 (page 38 of reply)

B. Facts of the complaint

3. The complainants have made the following submissions in the complaint: -
- The complainants booked a unit no. 254, 1st floor, block no. A in the respondent project namely "Town Square-II, Vatika India Next, Gurugram, Haryana-122004, having basic sale price of Rs.52,20,000/- along with EDC/IDC of Rs. 2,61,000/- as also mentioned in the buyers' agreement. They booked the said commercial unit in the joint names of himself and his son Mr. Saleem Gangar. However, in the account statement dated 06.12.2018, the respondent has malafide shown the total basic sales price of Rs. 57,15,000/- with other charges of Rs. 3,39,090/- and the total sales consideration for the said unit as Rs. 60,54,090/-. They booked the above-mentioned commercial unit on 19.12.2013 and deposited the advance payment of Rs. 6,00,000/-. They also deposited the sum of Rs. 10,44,000/- in cash on 27.12.2013 but the respondent has not given the receipt of the same despite repeated several requests and demands of the complainants. It appears that it has turned dishonest



and fraudulent and therefore, mischievously and malafide not issuing the receipt and acknowledging the payment of the sum of Rs. 10,44,000/- as paid by them on the firm assurance and promise of the respondent and its officials that the receipt and acknowledgement for the same would be issued for the said cash payment. But till date the said assurances and promises have not been fulfilled by it. Even in the account statement, it has not shown the payment of Rs. 10,44,000/- as received from them in cash. They further deposited the sums of Rs. 4,50,305/-, Rs. 1,70,000/-, Rs.2,80,333/-, Rs. 15,010/ & Rs. 15,00,000/- - respectively. So, in this way they have deposited the total sum of 40,59,648/- with it till date, out of the aforementioned total sale price of Rs. 52,20,000/- along with EDC/IDC of Rs. 2,61,000/-.

- b. The respondent has executed the buyer's agreement dated 05.10.2015 and as per the clause no. 17 of the said agreement, the respondent/developer has agreed and assured the complainants that the construction of the said commercial unit would be completed within a period of 48 months from the date of execution of the agreement. It has also been agreed by it that on completion of construction, they would offer in writing for taking over the physical possession of the commercial unit and use in terms of the agreement within 60 days. It has further agreed that if they failed to handover possession of the commercial unit within the stipulated period, then they would pay to the complainants a compensation of Rs. 5/- per sq.ft. of the super area per month for the period of such delay after expiry of the initial period of sixty days from the stipulated date for delivery of possession.



- c. It is submitted that the said commercial unit was booked by the complainants with the respondent on 19.12.2013, and the buyer agreement was executed on 05.10.2015. Even if the period of 48 months is considered from the date of the said agreement, then also the construction had to be completed by it by 05.10.2019 and to give the physical possession of the said commercial unit to the complainants within next 60 days. However, it has not only failed to complete the construction work of the said commercial unit within the said stipulated period but has also failed to handover the physical possession of the said property to them till date. In fact, it has failed to obtain the OC and completion certificate of the said unit from the competent authority till date and legally, it cannot handover the possession of the unit to them.
- d. That the complainants have already made several requests and representations through various correspondences to the respondent and has shown intention for taking over the physical possession of the said commercial unit and to make the remaining cost of the said unit subject to the grant of OC to it by the competent authority. However, it has not been granted OC and completion certificate by the competent authority till date and on the other hand, the respondent is unnecessarily and malafidely harassing and threatening the complainants, with dire consequences, for cancellation/termination of the allotment and agreement of the said commercial unit and also to forfeit the deposited amount of Rs. 40,59,648/- by them with it. It is submitted that the respondent cannot adopt unfair means and tactics to harass or cancel/terminate the allotment of the commercial unit made in favour of the complainants and forfeit and usurp the deposited amount of sale

A



consideration. The respondent is legally bound and required to first obtain the OC and completion certificate for the said commercial unit & project from the competent authority and only thereafter, it can offer and deliver the physical possession of the said commercial unit. However, since it has failed to fulfil the said mandatory legal requirements of obtaining OC and completion certificate. Therefore, the action of it is discriminatory, unconstitutional, arbitrary and illegal in the eyes of law.

- e. That the respondent malafide and wrongly issued a letter dated 15.07.2019 and stated that it is an intimation of possession of the unit no. RET-007-level 2 A1-254 at "Town Square-2". It has also been informed that after completion of construction, the final area of the said property is 635 sq.ft. and they are commencing the process of handing over the project. After receipt of the said letter dated 15.07.2019, they contacted the respondent and enquired whether the OC and completion certificate have been obtained by it while offering the possession of the unit. But no reply was given by it and instead it's officials asked for depositing the wrong and illegal demand of the dues. They also lodged strong protest and objections for the alleged demand of dues and also for not showing the cash deposit of Rs. 10,44,000/- and it did not give any satisfactory reply
- f. That to further shock and dismay of the complainants, the respondent sent further letter dated 01.08.2019 and asked the complainant to immediately deposit the alleged amount of Rs. 51,70,270/-. However, they sent an email dated 18.09.2019 to the respondent and objected to the inclusion of Rs. 32,934/- as interest on overdue amount as the respondent has not yet offered the possession. They have also mentioned that they visited the site and

Handwritten signature/initials in blue ink.



found that the construction was still underway and not complete and the unit was not fit for possession. It was also stated in the said email that as per the terms and conditions of the allotment/purchase agreement, the remaining outstanding i.e., 70% amount would become payable at the time of offer of possession and no offer of possession has been made by the respondent as yet. They requested to provide the completion certificate and offer of possession letter.

- g. The complainants further sent email dated 14.10.2019 to the respondent. But instead of replying to the said email of the complainants or complying with the requirements, it malafide issue the notice for termination of dated 06.11.2020 and have alleged that there is breach of the terms of agreement by the complainants and non-payment of the amount of Rs. 52,94,407/-. It was informed that in case the complainants fail to pay the alleged demanded amount, then the allotment of the said unit would be cancelled and there would be forfeiture of the amount deposited by them. They sent an email on dated 16.11.2020 with regard to the above letters dated 01.08.2019 and 06.11.2020 of the respondent, and referred to email dated 14.10.2019, with request for justification for interest amount of Rs. 32,934/- under the header "interest on overdue amount", completion certificate & offer of possession letter but there was no response from it on the above three points. Through the said email on dated 16.11.2020, they also protested for increasing the outstanding amount charging of excessive interest amount and it was also mentioned that there is no justification for charging interest amount in absence of completion certificate and offer of possession letter. The complainants have specifically mentioned



that they are ready to make the outstanding payment but since the completion certificate and possession letter is not providing, charging of interest on outstanding amount unjustifiable.

- h. A personal meeting was held between the parties/authorized official in November, 2020 and in that meeting, it was agreed that the remaining outstanding payment could be made in three phases i.e., first immediately and accordingly, the complainants and has already paid Rs. 15,00,000/- on 24.12.2020 and second in March/April 2021 and third & final at the time of handing over of physical possession. However, they sent an email dated 01.03.2021 to the final notice for termination as sent by it. They have specifically mentioned that the outstanding amount shown by it is incorrect as payment of Rs. 15,00,000/- as made on 24.12.2020 by the complainants have not been shown and credited while making claim of alleged outstanding amount. But to the great shock and disappointment of the complainants, the respondent sent an email dated 02.03.2021, asked them to make the payment immediately. It was further wrongly stated that the shop is ready for possession. They also sent an email dated 01.04.2021 to it and requested for providing via email statement of account of the unit. Since it has failed to complete the construction and obtain the completion certificate, therefore, did not issue offer of possession letter, as per the request of the complainants made repeatedly through various communication. Rather, the respondent sent an email dated 17.06.2021 and informed that the booking is terminated with immediate effect and the property would be released for further selling and they are sending the final calculation sheet with all deductions and forfeitures.

A



- i. Lastly, the respondent sent a letter dated 27.07.2021 to the complainants and stated therein that they have cancelled the builder buyer agreement and forfeited the deposited amount and made further demand of Rs. 5,43,890/- from them. They crave the indulgence of the authority to direct it to provide the completion certificate and offer of possession letter to them. After completion of the construction work of the unit, they are ready to deposit the actual and outstanding amount, without penal or other interest and levies, after the fulfilment of the above requirement by the respondent.

C. Relief sought by the complainants:

4. The complainants have sought following relief(s).
 - i. Direct the respondent to obtain the CC and provide the copy of the CC along with offer of possession letter to the complainants in respect of the booked/allotted unit.
 - ii. Direct the respondent to deliver the physical possession of the booked unit no. 254, located on the 1st floor of building block no. A in town square II Vatika India Next, Gurugram.
 - iii. Direct the respondent to pay the charges for delay in completing and delivering the said unit on the deposited amount i.e., Rs. 40,59,648/- at the prescribed rate of interest as per rule 15 of HRERA w.e.f. Oct 2019 till the filing of this present complaint i.e. Rs. 5,42,914/- and further till the delivery of possession and grant of OC.
 - iv. Direct the respondent to withdraw all the illegal email and correspondences of cancellation of the builder buyer agreement, forfeiture etc.
 - v. Direct the respondent to withdraw the penal interest or any other levies etc. other than the actual basic price as per the buyers' agreement and further to give credit and issue the receipt of the deposited cash amount of Rs. 10,44,000/-.



vi. Direct the respondent to reimburse litigation cost of Rs. 1,00,000/- to the complainants as they were constrained to file the same due to its callous and indifferent attitude and the same has been deposited in the account of the lawyer.

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 to plead guilty or not to plead guilty.

D. Reply by the respondent.

6. The respondent contested the complaint on the following grounds: -

a) That the complainants have got no locus standi or cause of action to file the present complaint. The complaint is based on an erroneous interpretation of the provisions of the Act as well as an incorrect understanding of the terms and conditions of the buyers' agreement dated 05.10.2015 as shall be evident from the submissions made in the following paras of the reply.

b) That the complainants have himself violated the obligations as set in within the Section 19 of the RERA Act and has further breached the terms of the buyer's agreement dated 05.10.2015. The complaint has been filed by hiding the true facts of the case and by placing half-baked truths. Thus, the complaint ought to be outrightly be dismissed with heavy costs.

c) The complainants have failed to make payments as per the agreed payment plan and an outstanding is Rs. 51,21,912/- in lieu of the 'Instalment due offer of possession' resulted in cancellation of booking and termination of the agreement. It is most pertinent to submit that even after numerous opportunities and reminders, the complainants have failed to fulfil their promise of paying the consideration amount as mutually decided. Hence, there being no



fault on the part of respondent, it is entitled to cancel the booking. The respondent issued several reminders to the complainants to pay the balance amount and yet they failed to do so.

d) It is submitted that when the above-mentioned demand letters, reminders and termination notice were issued, the respondent was legally entitled to cancel the allotment on account of non-payment of due instalments and to forfeit the earnest money. It is pertinent to mention that the complainants have committed breach of understanding arrived at between the parties and failed to make any payment towards the unit. They have wilfully defaulted against the payments of due instalments with regard to demand letter as marked in annexure R-2, R-3 and R-4. The continued failure of the complainants to fulfil obligations under the buyer's agreement dated 05.10.2015 and also under section 19 of the Act resulted in issuance of cancellation-cum-recovery notice dated 27.07.2021. Thus, the booking and allotment of the complainants have already been terminated and accordingly cancelled by it vide cancellation-cum-recovery notice dated 27.07.2021 marked here as annexure R-5.

e) That the right of the respondent to cancel allotment/buyer's agreement emanates out of the agreed clause 12 of the terms and condition of the application for allotment dated 19.12.2013 and clause 2(e) of the buyer's agreement dated 05.10.2015 whereby the complainants, were aware and agreed to cancellation of the allotment upon default in making payment within the time as stipulated in the payments schedule. As per the procedure to be followed for cancellation, the company if elects to cancel the agreement, they had 30 days from the date of notice to rectify the

A



default of non-payment. Further upon the expiry of 15 days of notice if the default of non-payment continued, then the agreement was to be automatically cancelled without further notice to the complainants. Also, upon the cancellation the company had the right to retain, as for liquidated damages, the entire earnest money as specified in clause 4 of the buyer's agreement along with other non-refundable amounts like interest on delayed payments, brokerage, etc. As per clause 4 of the buyer's agreement dated 05.10.2015, the complainants agreed that the earnest money would be an amount of 10% of the total consideration amount of the unit.

- f) That as per clause 17 of the terms and conditions of the application for booking the respondent was to make delivery of possession within 48 months from the date of the agreement, further vide letter of intimation of possession dated 15.07.2017 the complainants were informed of completion of construction and demand of last instalment was raised. However, the complainants were not making due payments to it for the unit in question and got their booking terminated on 27.07.2021.
- g) That the complainants have come before the authority with unclean hands. The complaint has been filed just to harass the respondent and to gain unjust enrichment. The actual reason for filing of the present complaint stems from the changed financial valuation of the real estate sector in the past few years and the allottee malicious intention to earn some easy buck. It is pertinent to mention here that for the fair adjudication of grievance as alleged by the complainants, detailed deliberations by leading the evidence and cross-examination is required. Thus, only the civil court has

12



jurisdiction to deal with the cases requiring detailed evidence for proper and fair adjudication.

- h) It is submitted that the complainants entered into buyer's agreement dated 05.10.2015 with the respondent owing to the name, goodwill and reputation of the respondent, in terms with the buyers' agreement promised to deliver the possession of the residential unit within the time frame as defined under clause 17 of the buyer's agreement within 48 months from the date of execution of buyer's agreement, i.e., by 05.10.2019 and the respondent as promised issued the letter of intimation of possession dated 15.07.2017. However, the complainants failed to make due payment of instalment as agreed vide annexure II of the buyer's agreement dated 05.10.2015. Thus, the respondent had no option but to cancel the allotment vide cancellation-cum-recovery notice dated 27.07.2021.
- i) That it is brought to the knowledge of the authority that the complainants are guilty of placing untrue facts and are attempting to hide the true colour of their intention. Before signing the buyer's agreement, the complainants were well aware of the terms and conditions as imposed upon the parties under the buyer's agreement and only after thorough reading, the said BBA signed and executed.
- j) That the various contentions raised by the complainants are fictitious, baseless, vague, wrong and created to misrepresent and mislead the authority, for the reasons stated above. It is further submitted that none of the reliefs as prayed for by the complainants are sustainable in the eyes of law. Hence, the complaint is liable to be dismissed with imposition of exemplary cost for wasting the

ra



precious time and efforts of the authority. The complaint is an utter abuse of the process of law and hence deserves to be dismissed.

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 and written submissions made by the parties.

E. Jurisdiction of the authority

8. The authority has complete territorial and 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 Haryana Real Estate Regulatory Authority, Gurugram shall be entire Gurugram district for all purposes. 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, 2016 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)(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:

A



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 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 relief sought by the complainants.

F.I Direct the respondent to withdraw all the illegal emails/ letters and correspondences of cancellation/termination of the buyers' agreement, forfeiture etc.

12. The complainants booked a unit in the project of respondent namely "Town Square II" and paid booking amount of Rs. 6,00,000/- leading to allotment of the subject unit. A buyers' agreement in this regard was executed between the parties on 05.10.2015. The complainants paid Rs.30,18,389/- out of total sale consideration of Rs. 60,54,090/-. The due date for completion of project and offer of possession of the allotted unit was agreed upon as 05.10.2019. It is evident that the respondent issued an intimation of offer of possession of the allotted unit on 15.07.2019 without obtaining an occupation certificate or completion certificate of the project and thereafter issued reminder letters to clear outstanding dues. It is a fact that the occupation certificate of the project was received by the promoter only on 17.02.2022. When the complainants failed to comply with reminder letters and to pay the amount demanded vide those communications, it led to issuance of notice of termination of the allotted unit vide letter dated 24.02.2021 and followed by a letter of cancellation dated 27.07.2021. Vide the later



communication, the complainants were directed to pay Rs. 5,43,890/- to the promoter within 10 days from the receipt of that letter and failing which the allotment was liable to be cancelled. It is not disputed that till the issuance of letter dated 27.07.2021, the complainants had already paid 48% of the sale consideration against the allotted unit. The due date for completion of the project has already expired on 05.10.2019. Though, the promoter offered possession of the allotted unit to the complainants vide an intimation of possession dated 15.07.2019, but without obtaining occupation certificate of the project and the same being not valid in the eyes of law. Moreover, at the time of executing builder buyer agreement on 05.10.2015, a payment plan of the allotted unit was also agreed upon between the parties. A perusal of the same shows that 28% of the BSP was to be paid by the allottees prior to offer of possession and the remaining was to be paid after completion of the project and on valid offer of possession. Thus, in such a situation, the respondent/builder was not entitled to raise demand against the allottees when they have already paid 48% of the sale price and that too without completing the project and obtaining occupation certificate, admittedly received on 17.02.2022.

13. On consideration of above-mentioned facts, the authority observes that the allottees paid a sum of Rs. 30,18,389/- out of total consideration of Rs. 60,54,090/- i.e., (48%) of the total sale consideration. Though the allottees made payments as per the payment plan but the fact cannot be ignored that the respondent has offered the possession of the allotted



unit on 15.07.2019, without obtaining OC/CC. Hence, it is concluded that the said offer of possession was a not a valid offer of possession and thus, the corresponding demand raised vide letters dated 15.07.2019, 24.02.2021 and lastly on 27.07.2021 cancelling the allotted unit are not legally sustainable and the same hereby ordered to be set-aside.

14. Though, while filing written reply on 22.07.2022, it was pleaded by the respondent/builder that the unit allotted in favour of the complainants has been cancelled on the ground of non-payment of dues vide letter dated 27.07.2021 but there is no whisper w.r.t. its re-allotment in favour of any person including Mr. Naresh Parshad vide letter dated 12.08.2021. If that would have been the position and the factual matrix, then the factum of re-allotment of the subject unit might have been disclosed in the pleadings while filing written reply. So, the plea of the respondent w.r.t. re-allotment of the subject unit after its cancellation vide letter dated 27.07.2021 is nothing but an afterthought ploy to defeat the legitimate claim of the allottees and deprived them of their valuable rights in that property. So, the plea of respondent/builder w.r.t. re-allotment of the subject unit vide letter dated 12.08.2021, in favour of Mr. Naresh Parshad is after thought just to escape the consequences of the case and defeat the genuine claim of the claimants. Thus, the re-allotment of the subject unit vide letter dated 12.08.2021, is ordered to be se-aside and the unit is ordered to be restored to its original position.

F.II Direct the respondent to obtain the completion certificate (sic: Occupation certificate) and provide the copy of the completion



certificate (sic: Occupation certificate) along with offer of possession letter to the complainants in respect of the booked/allotted unit.

15. Though, at the time of filing of the complaint, the respondent/builder did not obtain occupation certificate of the project, but during the course of filing written submission, it was pleaded by the later that it has obtained the same from the competent authority on 17.02.2022.

F.III Delay possession charges.

16. 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

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

.....

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."

17. Clause 17 the agreement to sell provides for handing over of possession and is reproduced below:

17.Handing over possession of the commercial unit

*The Developer based on its present plans and estimates and subject to all just exceptions, contemplates to **complete construction of the said unit within a period of 48 months from the date of execution of this Agreement** unless there shall be delay or there shall be failure due to reasons mentioned in this agreement or due to failure of buyer(s) to pay in time the price of the said commercial unit along with all other charges and dues in accordance with the schedule of payments.*

At the outset, it is relevant to comment on the preset possession clause of the agreement wherein the possession has been subjected to providing necessary infrastructure specially road, sewer & water in the sector by the government, but subject to force majeure conditions or



any government/regulatory authority's action, inaction or omission and reason beyond the control of the seller. The drafting of this clause and incorporation of such conditions are not only vague and uncertain but so heavily loaded in favour of the promoter and against the allottees that even a single default by the allottee in making payment as per the plan may make the possession clause irrelevant for the purpose of allottee and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the agreement to sell by the promoter is just to evade the liability towards timely delivery of subject unit and to deprive the allottee of his right accruing after delay in possession. This is just to comment as to how the builder has misused his dominant position and drafted such mischievous clause in the agreement and the allottee is left with no option but to sign on the dotted lines.

18. Payment of delay possession charges at prescribed rate of interest:

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.

19. 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.
20. 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., 28.03.2023 is **8.70%**. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., **10.70%**.
21. 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;"*
22. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **10.70%** by the respondent



/promoter which is the same as is being granted her in case of delayed possession charges.

23. On consideration of the circumstances, the documents, submissions made by the parties and based on the findings of the authority regarding contraventions as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 17 of the agreement executed between the parties on 05.10.2015 and the possession of the subject apartment was to be delivered within 48 months from the date of agreement to sell. As far as grace period is concerned, the same is disallowed for the reasons quoted above. Therefore, the due date of handing over possession was 05.10.2019. The respondent has failed to handover possession of the subject apartment till date of this order. Accordingly, it is the failure of the respondent/promoter to fulfil its obligations and responsibilities as per the agreement to hand over the possession within the stipulated period. The authority is of the considered view that there is delay on the part of the respondent to offer of possession of the allotted unit to the complainants as per the terms and conditions of the agreement to sell dated 05.10.2015 executed between the parties. Further no OC/part OC has been granted to the project. Hence, this project is to be treated as on-going project and the provisions of the Act shall be applicable equally to the builder as well as allottees.

24. 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 delay possession charges at rate of the prescribed interest @ 10.70% p.a. w.e.f. 05.10.2019 till receipt of occupation certificate i.e., 17.02.2022 + 2 months as per provisions of section 18(1) of the Act read with rule 15 of the Rules.

F.IV Possession

25. The complainants are seeking relief of possession in aforesaid relief. It is observed that the occupation certificate has been obtained on 17.02.2022 from the competent Authority but till date no offer of possession has been made. The respondent is directed to offer the possession of the allotted unit within compliance of section 11(4)(b) within two months from date of this order and to demand balance amount after adjusting delay possession charges. Further, the complainants are also directed to take the possession of the allotted unit in compliance of obligation conferred upon it under Section 19(10) of Act within next two months after payment of such outstanding dues.

F. V Direct the respondent to withdraw the penal interest or any other levies etc. other than the actual basic price as per the buyers' agreement and further to give credit and issue the receipt of the deposited cash amount of Rs. 10,44,000/-.

26. The above-mentioned relief sought by the complainants were not pressed during the arguments in the passage of hearing and thus, cannot be deliberated upon. Hence, the authority has not raised any finding w.r.t. to the above-mentioned relief.

F.VI Litigation cost

- A* 27. The complainants are also seeking relief w.r.t. litigation expenses & compensation. 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.* 2021-2022(1) RCR(c),357 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, the complainants are advised to approach the adjudicating officer for seeking the relief of litigation expenses

G. Directions of the authority


28. 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 cancellation of the allotted unit vide letter dated 27.07.2021 on the ground of non-payment of dues and its re-allotment vide letter dated 12.08.2021 are hereby ordered to be set-aside and the same is re-stored to its original position. A direction is given to the respondent/builder to offer possession of the allotted unit to the complainants and give its possession after receipt of payments due.


A ✓



- ii. The respondent is directed to pay interest at the prescribed rate of @ 10.70% p.a. for every month of delay from the due date of possession i.e., 05.10.2019 till receipt of occupation certificate i.e., 17.02.2022 + 2 months.
 - iii. The respondent is directed to issue a revised account statement after adjustment of delay possession charges as per above within 30 days and thereafter the complainants are directed to pay outstanding dues, if any, within next 30 days.
 - iv. The rate of interest chargeable from the allottees by the promoter, in case of delayed payments shall be charged at the prescribed rate i.e., 10.70% 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.
 - v. The respondent shall not charge anything from the complainants which is not the part of the buyer's agreement.
29. The complaint stands disposed of.
30. File be consigned to registry.


Sanjeev Kumar Arora
Member

Haryana Real Estate Regulatory Authority, Gurugram


Vijay Kumar Goyal
Member

Dated: 28.03.2023