Corrected vide order dated 05-04-2023

05.04.2023

HARERA
GURUGRAM

Complaint No. 3490 of 2021

BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no.:	**3490 of 2021**
First date of hearing:	**24.09.2021**
Date of decision:	**06.07.2022**

1. ~~Anup~~ Anoop Kumar
2. Ram Prakash
R/o H No. 320, Sector 40, Gurugram — **Complainants**

Versus

M/s Ansal Housing and Construction Ltd.
Office address: 15 UGF, Indraprakash, 21, Barkhamba Road, New Delhi- 110001. — **Respondent**

CORAM:
Dr. K.K. Khandelwal — **Chairman**
Shri Vijay Kumar Goyal — **Member**

APPEARANCE:
Shri Jagdeep Kumar (Advocate) — Complainants
Smt Meena Hooda (Advocate) — Respondent

ORDER

1. The present complaint dated 08.09.2021 has been filed by the complainants/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

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obligations, responsibilities and functions as provided under the provision of the Act, or the rules and regulations made there under or to the allottee as per the agreement for sale executed *inter se*.

A. Unit and project related details

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

Sno.	Heads	Information
1.	Project name and location	"Ansal Hub 83 Boulevard", Sector-83, Gurugram
2.	Project area	2.60 acres
3.	Nature of the project	Commercial complex part of residential colony
4.	DTCP license no. and validity status	113 of 2008 dated 01.06.2008 valid up to and 71of 2010 dated 15.09.20210 valid up to
5.	Name of licensee	Buzz Estate Pvt. Ltd. & othrs.
6.	RERA registration details	Registered vide no. 09 of 2018 dated 08.01.2018 for 2.80 acres
7.	Unit no.	G-042 [pg. 33 of complaint]
8.	Unit measuring	539 sq. ft. [pg. 33 of complaint]
9.	Date of execution of flat buyer agreement	18.12.2014 [pg. 29 of complaint]
10.	Payment plan	Construction link
11.	Possession clause	*30* *The developer shall offer possession of the unit any time,* ***within a period of 42 months from the date of execution of the agreement or within 42 months from the***

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		date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later *subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 31. Further, there shall* ***be a grace period of 6 months allowed to the developer over and above the period of 42 months*** *as above in offering the possession of the unit.* *(Emphasis supplied)* [page 40 of complaint]
12.	Date of commencement of construction as per customer ledger dated 05.07.2019	15.12.2014 [pg. 55 of complaint]
13.	Due date of possession	18.12.2018 [Note: Due date calculated from date of agreement i.e., 18.12.2014 being later. Grace period allowed being unqualified]
14.	Delay in handing over possession till the date of order i.e., 06.07.2022	3 years 6 month 18 days
15.	Basic sale consideration as per BBA dated 18.12.2014	₹ 74,37,202.85/- [pg. 33 of complaint]
16.	Total sale consideration as per customer ledger dated 05.07.2019	₹ 80,64,565/- [pg. 51 of complaint]
17.	Amount paid by the complainant as per customer ledger dated 05.07.2019	₹ 76,70,366.16/- [pg. 54 of complaint]
18.	Status of the project	On-going project
19.	Occupation certificate	Not yet obtained
20.	Offer of possession	Not offered

B. Facts of the complaint

3. The complainant has pleaded the complaint on the following facts:

a. That the real estate project named "Ansal HUB 83, BOULEVARD", which is the subject matter of present complaint, is situated at Sector-83, Gurugram, therefore, the hon'ble authority do have the jurisdiction to try and decide the present complaint.

b. That the respondent had advertised itself as a very ethical business group that lives onto its commitments in delivering its commercial projects as per promised quality standards and agreed timelines. That the respondent while launching and advertising any new commercial project always commits and promises to the targeted consumer that their dream retail space & shop will be completed and delivered to them within the time agreed initially in the agreement while selling the dwelling unit to them. They also assured to the consumers like complainant that they have secured all the necessary sanctions and approvals from the appropriate authorities for the construction and completion of the real estate project sold by them to the consumers in general.

c. That the respondent was very well aware of the fact that in today's scenario looking at the status of the construction of commercial and housing projects in India, especially in NCR, the key factor to sell any dwelling unit is the delivery of completed commercial space within the agreed and promised timelines and that is the prime factor which a consumer would consider while purchasing his/her dream retail space/ commercial space. respondent, therefore used this tool, which is directly connected to emotions of gullible consumers, in its marketing plan and always represented and warranted to the consumers that their dream retail space/

commercial space will be delivered within the agreed timelines and consumer will not go through the hardship of paying rent for shop along-with the installments of loan like in the case of other builders in market.

d. That somewhere in the mid of 2013, the respondent through its business development associate approached the complainant with an offer to invest and buy a retail space/ commercial space in the proposed project of respondent, which the respondent was going to launch the project namely **"Ansals HUB83, BOULEVARD"** in the Sector-83, Gurugram (hereinafter referred to as "Said Project"). On 18.05.2013 complainant had a meeting with respondent at the respondent's branch office where the respondent explained the project details of "**Ansals HUB83, BOULEVARD**" and highlight the amenities of the project. Respondent represented to the complainant that the respondent is a very ethical business house in the field of construction of residential and commercial project and in case the complainant would invest in the project of respondent then they would deliver the possession of proposed retail space/ commercial space on the assured delivery date as per the best quality assured by the respondent. The respondent had further assured to the complainant that the respondent has already processed the file for all the necessary sanctions and approvals from the appropriate and concerned authorities for the development and completion of said project on time with the promised quality and specification. The respondent had also shown the brochures and advertisement material of the said

project to the complainant and assured that the builder buyer agreement for the said project would be issued to the complainant within one week of booking to made by the complainant. The complainant while relying upon those assurances and believing them to be true, complainant booked a retail space/ commercial space bearing shop no. G-042, Ansals HUB83, Boulvevard, Sector 83, Gurugram, Haryana in the proposed project of the respondent measuring approximately super area of 539 sq. ft. (50.07 sq. meter) in the commercial project to be developed by respondent. Accordingly, the complainant has paid Rs. 7,00,000/- (Rupees Seven Lakh only) through cheque bearing no 819122 dt 13.05.2013 and cheque no. 610093 dt 13.05.2013 as booking amount on 18.05.2015.

e. That in the said application form, the price of the said shop was agreed at the rate of Rs. 12,895/- per Sq. ft. mentioned in the said application form. At the time of execution of the said application form, it was agreed and promised by the respondent that there shall be no change, amendment or variation in the area or sale price of the said shop from the area or the price committed by the respondent in the said application form or agreed otherwise.

f. That approximately after one and half year on 18.12.2014 the respondent executed a buyer's agreement which consisting very stringent and biased contractual terms which are illegal, arbitrary, unilateral and discriminatory in nature, because every clause of agreement is drafting in a one-sided way and a single breach of unilateral terms of builder buyer's agreement by complainant, will

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cost him forfeiting of 20% of total consideration value of unit. Respondent exceptionally increase the net consideration value of shop by adding EDC, IDC and PLC and when complainant opposed the unfair trade practices of respondent they inform that EDC, IDC and PLC are just the government levies and they are as per the standard rules of government and these are just approximate values which may come less at the end of project and same can be proportionately adjusted on prorate basis and about the delay payment charges of 24% they said this is standard rule of company and company will also compensate at the rate of Rs 5 per sq ft per month in case of delay in possession of shop by company. Complainant opposed these illegal, arbitrary, unilateral and discriminatory terms of buyer's agreement but as there is no other option left with complainant because if complainant stop the further payment of installments, then in that case respondent forfeit 20% of total consideration value from the total amount paid by complainant.

g. That as per the clause – 30 of the said buyer's agreement dated 18th December 2014, the respondent had agreed and promise to complete the construction of the said shop and deliver its possession within a period of 42 months with a six (6) months grace period thereon from the date of start of construction.

h. That from the date of booking 18th May 2013 and till 17th May 2017, the respondent had raised various demands for the payment of installments on complainant towards the sale consideration of said shop and the complainant have duly paid and satisfied all those

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demands as per the buyer's agreement without any default or delay on their part and have also fulfilled otherwise also their part of obligations as agreed in the buyer's agreement. The complainant was and have always been ready and willing to fulfill their part of agreement, if any pending.

i. That as per annexure-A (payment plans) of buyer's agreement the sales consideration for said shop was Rs. 80,42,179.83/- (which includes the charges towards basic price – Rs 67,41,891/-, govt charges (EDC &IDC) – ₹ 2,95,275/-, car parking – Rs 3,00,000/-, Labour Cess Rs 9,703.83 and PLC for atrium facing – Rs 6,95,310/-) exclusive of Service Tax and GST.

j. As per the statement dated 05.07.2019, issued by the respondent, upon the request of the complainant, the complainant have already paid Rs. 76,70,637/- (Rupees Seventy-Six Lakh Seventy Thousand Six Hundred Thirty-Seven only) towards total sale consideration and applicable taxes as on today to the respondent as demanded time to time.

k. That the respondent has committed grave deficiency in services by delaying the delivery of possession and false promises made at the time of sale of the said shop which amounts to unfair trade practice which is immoral as well as illegal. The respondent has also criminally misappropriated the money paid by the complainant as sale consideration of said shop by not delivering the unit on agreed timelines. The respondent has also acted fraudulently and arbitrarily by inducing the complainant to buy the said shop on

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basis of its false and frivolous promises and representations about the delivery timelines aforesaid housing project.

C. Relief sought by the complainant:

4. The complainant has sought following reliefs:

a. Pass an order to direct the respondent to pay interest at the rate of 18% on account of delay in offering possession on Rs. 76,70,637/- (Rupees Seventy Six Lakh Seventy Thousand Six Hundred Thirty Seven only) paid by the complainant as sale consideration of the said shop from the date of payment till the date of delivery of possession.

b. Pass an order to direct the respondent to show the actual records of paying EDC to government and return the excess amount collected from Complainant in account of EDC charges.

c. Pass an order to direct the Respondent to provide Flat Buyers Agreement as specified in **Rule 8** of Haryana Real Estate (Regulation and Development) Rules, 2017.

d. Pass an order to direct the Respondent to update the status of Construction and Occupation Certificate.

e. Grant cost of litigation of Rs. 55,000/- to the complainant.

f. Any other relief/order or direction, which this hon'ble authority may, deems fit and proper considering the facts and circumstances of the present complaint.

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

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D. Reply by the respondent

6. Notice to the promoter/respondent through speed post and through e-mail address (kushagr.ansals@ansals.com) was sent; the delivery report of which shows that delivery was completed. Despite service of notice, the promoter/respondent has failed to file a reply within stipulated time period. Since the respondent company's put in appearance through its counsel Smt. Meena Hooda & Sh. Amandeep Kadyan Advocate, on 24.09.2021 & 30.03.2022. Further, the counsel for the respondent requested for adjournment to file written reply and the same was allowed with a specific direction to file the same within 2 weeks with an advance copy to the complainant. However, the respondent has failed to comply with the orders of the authority dated 30.03.2022, by not filing written reply within the time allowed, therefore, the defence of the respondent is struck off.

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 submission made by the parties.

E. Jurisdiction of the authority

8. The authority observed 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, 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. 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 relief sought by the complainant

F.I. Pass an order to direct the respondent to pay interest at the rate of 18% on account of delay in offering possession on Rs. 76,70,637/- (Rupees Seventy Six Lakh Seventy Thousand Six Hundred Thirty Seven only) paid by the complainant as sale consideration of the said shop from the date of payment till the date of delivery of possession.

11. In the present complaint, the complainant intends to continue with the project and is seeking delayed possession charges at prescribed rate of interest on the amount paid. Clause 30 of the BBA (in short, agreement) provides for handing over of possession and is reproduced below: -

> *"30.The developer shall offer possession of the unit any time,* ***within a period of 42 months from the date of execution of the agreement or within 42 months from the date of obtaining all the required sanctions and approval necessary for commencement of construction, whichever is later*** *subject to timely payment of all dues by buyer and subject to force majeure circumstances as described in clause 31. Further, there shall be* ***a grace period of 6 months allowed to the developer over and above the period of 42 months*** *as above in offering the possession of the unit."*

12. At the outset, it is relevant to comment on the pre-set possession clause of the agreement wherein the possession has been subjected to all kinds of terms and conditions of this agreement and application, and the complainants 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 allottees that even a single default by the allottees in fulfilling formalities and documentations etc. as prescribed by the promoter may make the possession clause irrelevant for the purpose of allottees and the commitment date for handing over possession loses its meaning. The incorporation of such clause in the flat buyer agreement by the promoter are just to evade the liability towards timely delivery of subject unit and to deprive the allottees 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 allottees is left with no option but to sign on the dotted lines.

13. **Admissibility of grace period:** The promoter has proposed to hand over the possession of the apartment within a period of 42 months plus 6 months from date of agreement or the date of obtaining all the required sanctions and approval necessary for commencement of construction whichever is later. The authority calculated due date of possession according to clause 30 of the agreement dated 18.12.2014 i.e., within 42 months from date of execution of agreement i.e.,

18.12.2014 being later. Since in the present matter the BBA incorporates unqualified reason for grace period/extended period of 6 months in the possession clause subject to force majeure circumstances. Accordingly, this grace period of 6 months shall be allowed to the promoter at this stage.

14. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottees 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."*

15. 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.

16. Consequently, as per website of the State Bank of India i.e., https://sbi.co.in, the marginal cost of lending rate (in short, MCLR) as on date i.e., **06.07.2022** is 7.50%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 9.50%.

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

> *"(za) "interest" means the rates of interest payable by the promoter or the allottees, as the case may be.*
> *Explanation. —For the purpose of this clause—*
> *(i) the rate of interest chargeable from the allottees by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottees, in case of default.*
> *(ii) the interest payable by the promoter to the allottees 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 allottees to the promoter shall be from the date the allottees defaults in payment to the promoter till the date it is paid;"*

18. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., **9.50%** by the respondent/promoter which is the same as is being granted to the complainants in case of delayed possession charges.

19. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 30 of the agreement executed between the parties on 18.12.2014, the possession of the subject apartment was to be delivered within 42 months from the date of execution of allotment or sanction of building plans whichever is later. The due date is calculated from the date of execution of agreement i.e., 18.12.2014, being later. Accordingly, period of 42 months expired on 18.06.2018. As

far as grace period is concerned, the same is allowed for the reasons quoted above. Therefore, the due date of handing over possession is 18.12.2018. The respondent has not yet offered the possession of the subject apartment. 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. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on the part of the respondent is established. As such the allottees shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 18.12.2018 till the actual handing over of possession of the unit, at prescribed rate i.e., 9.50 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

F.II. Pass an order to direct the respondent to show the actual records of paying EDC to government and return the excess amount collected from Complainant in account of EDC charges.

20. According to the BBA dated 18.12.2014 the complainant was liable to pay the EDC charges to the respondent as specifically mentioned at annexure A of the BBA at pg. 49 of the complaint. An amount of ₹ 2,95,274.98/- has been paid by the complainant towards EDC as mentioned in customer ledger dated 05.07.2019. Since the EDC is to be paid by the respondent to the DTCP, Haryana therefore any issue with regard to this shall be made before the competent authority.

F.III. Direct the respondent to provide the buyer's agreement as per the RERA, Act 2016

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21. Since in the present matter the BBA has already been signed between the parties on 18.12.2014. Therefore, 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. The same issue has been dealt by Hon'ble Bombay High Court in case titled as ***Neelkamal Realtors Suburban Pvt. Ltd. (supra)*** wherein it was held that the RERA Act does not contemplate rewriting of contract between the allottee and the promoter. The relevant para of the judgement is reproduced below:

> *"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...."*

F.IV. Direct the respondent to update the status of construction and OC

22. As per section 11(4)(b) of Act of 2016, the promoter is under obligation to obtain the completion certificate or the occupancy certificate, or both, as applicable, from the relevant competent authority as per local laws or other laws for the time being in force and to make it available to the allottees individually or to the association of allottees, as the case may be. The respondent is directed to intimate the stage of construction as well as intimation on receipt of OC from the competent authority.

F.V. Grant cost of litigation of Rs. 55,000/- to the complainant.

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23. The complainant is claiming compensation in the above-mentioned reliefs. The authority is of the view that it is important to understand that the Act has clearly provided interest and compensation as separate entitlement /rights which the allottee can claim. For claiming compensation under sections 12, 14, 18 and section 19 of the Act, the complainant may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

G. Directions of the authority

24. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations casted upon the promoter as per the functions entrusted to the authority under section 34(f):

i. The respondent is directed to pay interest at the prescribed rate of 9.50% p.a. for every month of delay from the due date of possession i.e., 18.12.2018 till the actual handing over of possession.

ii. The arrears of such interest accrued from 18.12.2018 till the date of order by the authority shall be paid by the promoter to the allottee within a period of 90 days from date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules.

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

iv. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 9.50% 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.

v. The respondent shall not charge anything from the complainant which is not the part of the agreement.

vi. The cost imposed during the proceedings on either party be included in the decree sheet.

25. Complaint stands disposed of.

26. File be consigned to registry.

(Vijay Kumar Goyal)
Member

(Dr. K.K. Khandelwal)
Chairman

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 06.07.2022