1BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**5437 of 2022**
Date of filing complaint:	**10.08.2022**
First date of hearing:	**11.10.2022**
Date of decision :	**20.07.2023**

1. 2.	Smt. Neena Agrawal W/o Sh. Kamal Kishore Agrawal Sh. Kamal Kishore Agrawal S/o Sh. Rameshwar Prasad Agrawal **Both R/O**: H.no. N-269, 1st floor, Mayfield Garden, Sector-51, Gurugram	**Complainants**
	Versus	
	M/s TARC Limited **Regd. office:** 2nd Floor, C-3, Qutab Institutional Area Katwaria Sarai, New Delhi, South Delhi-110016	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
APPEARANCE:	
Sh. Rahul Yadav (Advocate)	Complainants
Sh. Manu Bajaj (Advocate)	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 29 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 provisions 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 the project, the details of sale consideration, the amount paid by the complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.no.	Particulars	Details
1.	Name of the project	"Maceo", Sector- 91, Gurgaon
2.	Nature of project	Group housing colony
3.	**RERA registered/not registered**	**Registered** vide registration no. 314 of 2017 dated 18.08.2017
	Validity status	17.08.2019
4.	**DTPC License no.**	71 of 2008 dated 25.03.2008
	Validity status	24.03.2025
	Licensed area	15.575 acres
	Name of licensee	Jubliant Software Service Private Limited
5.	Allotment letter	18.01.2012 (As per page no. 18 of reply)
6.	Date of apartment buyer agreement	08.03.2013 (As per page no. 21 of complaint)
7.	Unit no.	E-1003 on 10th floor of tower E (As per page no. 29 of complaint)
8.	Unit area admeasuring	2146 sq. ft. [Super area] (As per page no. 29 of complaint)
9.	Revised super area	2320 sq. ft. (+ 8.11%) (As per page no. 21 of reply)

10.	Possession clause	**Clause 7.1** *The Developer based on its present and estimates and subject to all just exceptions, proposes to complete construction/ development of the said project and handover the possession of the said Apartment to the Allottee* ***within a period of 36 months from the date of execution of this agreement unless there shall be any delay or failure due to force majeure*** *. The Allottee(s) understands and agrees that the developer shall be entitled for a* ***grace period of 180 days after the expiry of the aforesaid 36 months****. The Developer after completing the construction shall apply and obtain the occupation certificate in the in respect of the residential apartment(s) from the concerned authority. However, in case any condition arises that is beyond the control of the company including but not limited to force majeure condition, the remaining period available shall commence after the expiry of such condition.*
11.	Due date of possession	**08.09.2016** (Calculated from date of apartment buyer agreement i.e. 08.03.2013 + grace period of 180 days) ***Grace period of 180 days is allowed.***
12.	Total sale consideration	Rs. 69,45,410/- (As per page no. 30 of complaint)
13.	Amount paid by the complainant	Rs. 62,58,352/- (As per SOA dated 03.06.2022 on page no. 87 of complaint)
14.	Tri-partite Agreement	19.03.2013 [as per page no. 60 of complaint]

15.	Application for OC dated	19.04.2019 (Inadvertently, mention as 25.08.2020 in proceedings dated 20.07.2023.)
16.	Occupation certificate	28.11.2019 [As per site of DTCP]
17.	Offer of possession	30.11.2019 [As per page no. 21 of reply]

B. Facts of the complaint:

3. That the respondent gave advertisement in various leading newspapers about its forthcoming project named "MACEO", Sector-91, Gurugram, whereby promising various advantages, like world class amenities and timely completion/execution of the project etc. Relying on the promise and undertakings given by the respondent, the complainants booked a unit admeasuring 2146 sq. ft. in aforesaid project of the respondent for total sale consideration of Rs. 69,45,410/- including BSP, car parking, IFMS, club membership, EDC, IDC, PLC etc.

4. That the complainants paid a sum of Rs. 4,50,000/- in addition to Rs. 50,000/- already paid by them and signed the application form. Subsequently, a builder buyer agreement was executed between the complainants and M/S Anant Raj Limited on 08.08.2013. That as per the clause no. 7 of said agreement, the date of possession was agreed to be 36 months from the date of execution of the builder buyer agreement.

5. That the respondent thereafter without any prior intimation to the complainants unilaterally changed the size of the unit from 2146 sq. ft to 2320 sq. ft.

6. That the complainants took a loan of Rs. 25,00,000/- from LIC Housing Finance Ltd to purchase the said unit and a tripartite agreement dated 19.03.2013 was executed between the complainants, respondent and financer and due to the delay in delivery of the possession by the respondent, they are burdened with additional payment of EMI every months' to the financer.

7. That the complainants made payment of Rs. 62,58,352/- vide different cheques on different dates towards the total sale consideration of the allotted unit and the respondent issued payment receipts and account statement in this regard.

8. That they have made regular visits at the project site and observed that there are serious qualities issues with respect to the construction carried out by it till now. The flats were sold by representing that the same will be luxurious apartment. However; all such representations seem to have been made in order to lure them to purchase unit at extremely high prices. The respondent has compromised with levels of quality and is guilty of mis-selling. There are various deviations from the initial representations. The respondent marketed luxury high end apartments, but have compromised even with the basic features, designs and quality to save costs. The structure, which has been constructed, on face of it is of extremely poor

quality. The construction is totally unplanned, with sub-standard low grade defective and despicable construction quality. It sold the project stating that it will be next landmark in luxury housing and will redefine the meaning of luxury but it has converted the project into a concrete jungle. There are no visible signs of alleged luxuries.

9. That the agreement was executed on 08.03.2013 and accordingly the project was to be completed in 36 months with grace period of six months. The respondent have committed various acts of omission and commission by making incorrect and false statement in the advertisement material as well as by committing other serious acts as mentioned in preceding paragraph. Further, it has breached the fundamental term of the contract by inordinately delaying in delivery of the possession. It has not acknowledged any request of the complainant in regard to the status of the project.

C. Relief sought by the complainants:

10. The complainants have sought following relief(s):

    i. Direct the respondent to deliver the possession of the allotted unit.
    ii. Direct the respondent to pay interest on amount paid by the complainants at the prevailing rate of interest as per RERA.
    iii. Direct the respondent to pay Rs. 1,00,000/- as litigation cost.

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

D. Reply by respondent:

12. The respondent by way of written reply made the following submissions: -

a. That the said total sale consideration as mentioned therein was non-inclusive of the applicable taxes which are levied at the time of offer of possession, which is clear from a bare perusal of the payment plan' annexed along with the apartment buyer agreement dated 08.03.2013, whereby the total consideration of the subject unit no. E-1003 was mentioned as Rs. 69,45,410/- along with additional charges of Rs.14,83,840/-. Moreover, the payment plan clearly stipulates that service tax shall be payable on each installment as per the government rules, and other charges like stamp duty and maintenance charges shall be payable at the time of possession. Hence, the complainants were always aware that Rs. 69,45,410/- is not the total sale consideration, and the same is bound to be enhanced after levying of various other charges.

b. That the said sale consideration was subject to change as per clause 10 of the apartments buyer's agreement dated 08.03.2013 executed between the parties, which gives the right to the respondent to alter the area of the unit. Therefore, considering the aforesaid factors, the total sale consideration amounts to Rs. 79,01,224/- as opposed to Rs. 69,45,410/- specified by the complainants, owing to the applicable rates and the increase in the area of the subject unit, as reflected in the

statement of account provided with the letter of offer of possession discussed hereunder in detail. Further, clause 7 of the agreement grants the right to the respondent to alter the area of the unit before receiving the occupation certificate. Further, as early as at the time of the allotment of the instant unit, they agreed to any such alteration of the area by way of letter dated 18.01.2012, which was an attachment to the allotment letter, whereby they categorically stated that "I further agree and understand that the Floor Plan/Area, Specifications are subject to change/modification at any time by M/s Anant Raj Industries Limited without any notice." Pertinently, as is evident from the above, the respondent was entitled to alter the area of the unit unilaterally, however yet, the alteration was not done unilaterally and it duly informed the complainants about such increase in area vide its letter dated 28.12.2017, wherein apart from intimating them about the revised building plan, it further invited objections/suggestions from the complainant, however, no such objections were ever raised by the complainant in this regard. Further, such change in area was also intimated to the complainant vide its offer of possession letter dated 30.11.2019, to which they never objected, and has raised such claim in the instant complaint for frivolous reasons merely to draw an adverse inference against the respondent.

c. That the facility of availing the loan facility from LIC Housing Finance Ltd. was the sole discretion of the complainants and the consequences thereof cannot be attributed to the respondent in any manner.

d. That it is denied that the complainants have made a payment of Rs. 62,58,352/- to the respondent against the said unit whereas it is submitted that they merely paid an amount of Rs. 54,54,424/- and to show its bona fide, the respondent itself adjusted an amount of Rs. 8,03,928/- against the delayed possession charges payable by it in lieu of the delayed possession. The respondent has already paid the applicable delayed possession charges to the complainants and nothing more is due and payable by it. On the contrary, the complainants are still under an obligation to pay an outstanding amount of Rs. 24,48,800/- to the respondent since the date of offer of possession and instead of payment of same they filed the instant frivolous complaint merely with the view to get out of its obligation to pay the balance outstanding amount. Pertinently, the complainants have defaulted in making the various payments since the very beginning which may be clear upon perusing the numerous reminders issued by the respondent to them where requesting them to pay the installments as per the payment schedule agreed upon by the complainants at the time of execution of the agreement. Pertinently, in lieu of the gross delay caused

by the complainants in releasing the outstanding payments of the respondent, it was constrained to issue final reminders to them, in non-compliance whereof their allotment would automatically stand revoked. Hence, final reminder/notice of termination dated 30.09.2014, 12.11.2014, and 25.04.2015 were issued it, informing the complainants that if the balance outstanding amount is not paid by them within the stipulated period, their agreement shall stand revoked automatically.

e. That the complainants approached the respondent on various occasions thereby requesting it to cancel such termination notices and to not cancel the allotment of the complainants and repeatedly assured the respondent that the payment shall be made at the earliest. With a view to support the complainants and to not escalate the matter further, the respondent repeatedly revoked its termination notices, despite that , the complainants continuously defaulted in its payments, and thus, are liable to pay interest on the same.

f. That the complainants repeatedly visited the site of the project, however, they did not raise any objection with respect to the quality of the construction work or the materials used for the said unit. Evidently, the said objections have been stated in the instant complaint merely to mislead the Authority and to tarnish the image of the respondent.

g. That the respondent was liable to handover the possession of the said unit to the complainants by 08.09.2016, however, such due date was subject to force majeure conditions as stipulated in clause 19 of the said agreement. In this regard, it is most humbly submitted that the said project had to undergo unforeseen and adverse circumstances hampering and delaying the work progress of the said project because of which the possession of the flat/ apartment could not be handed over within the stipulated period. It is pertinent to mention that the progress of the project was affected due to circumstances which were beyond the control of the respondent and the same are covered under the force majeure conditions stipulated in clause 19 of the said agreement. The delays were caused on account of orders passed by the Hon'ble National Green Tribunal and the State Pollution Control Board which issued various directions to builders to take additional precautions and steps to curtail pollution. On account of the aforementioned reasons, the progress of the work at the site was abruptly hampered. All these events led to suspension and stoppage of works on several occasions which also resulted in labourers and contractors abandoning work. As a result of various directions from the authorities at separate occasions, regarding water shortage and pollution control etc., coupled with labourers and contractors abandoning the works; the respondent had to

run from pillar to post in order to find new contractors and labourers, thus affecting the progress of the project. Without prejudice, it is most respectfully submitted that overcoming the aforesaid force majeure conditions, the respondent has completed the construction of the said unit in 2019 itself, and received the occupation certificate on 28.11.2019, where after offer of possession was extended to the complainants vide letter dated 30.11.2019. Hence, it is submitted that the delay caused in handing over of possession of the said unit was not deliberate and was beyond the control of the respondent.

h. That the respondent on several occasions intimated the status update of the project to the complainants, and even invited them for a site visit so as to satisfy themselves with respect to the progress of the said project and the same is evident from a bare perusal of the letters dated 04.07.2016, 10.04.2017 20.04.2017, and 30.11.2017 issued by it to the complainants.

i. That the complainants did not approach the respondent only in lieu of the advertisement published by the respondent but has booked the flat/unit in the said project after due diligence and on being satisfied with the background of the respondent-company and its project.

j. That the respondent is not liable to pay any further delayed possession charges as the respondent has already paid an amount of Rs. 8,03,928/-

to the complainant as per the agreement between the parties. Moreover, the complainants are not satisfied with such amount of delayed possession charges and are demanding fresh calculation of the same, the said amount ought not be adjusted from the balance consideration of the complainants and they would be made liable to pay the outstanding amount of Rs. 24,48,800/- to the respondent along with interest.

k. That as on date, an amount of Rs. 24,48,800/- is outstanding on behalf of the complainants which they have not paid for reasons best known to them, and merely to get out of their obligation to make such payment, the complainants have initiated the instant complaint as per its whims and fancies without any basis. Further, they should have referred the disputes, if any, to the Arbitration in view of clause 35 of the Apartment buyer agreement executed between the parties. The complainants and the respondent have specifically and categorically agreed that in the event of disputes, claim and /or differences shall be referred to a sole arbitrator appointed by respondent.

13. All other averments made in complaint were denied in toto.

14. Copies of all the relevant documents have been filed and placed on 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:

15. The plea of the respondent regarding rejection of complaint on ground of jurisdiction stands rejected. 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

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the 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 allottee as per the agreement for sale, or to the association of allottee, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottee, or the common areas to the association of allottee 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 promoter, the allottee and the real estate agents under this Act and the rules and regulations made thereunder.

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 objections raised by the respondent.

F.I Objection regarding complainant is in breach of agreement for non-invocation of arbitration.

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

> *"Clause 35: Any and all disputes arising out of or in connection with or in relation here to shell so far as possible in the first instance be amicably settled between the developer and the lotteries raising the dispute . in the event of dispute, claim and/or differences not being amicably resolved such disputes shall be referred to sole arbitrator to be appointed by the developer. The allottees shall not object to the appointment of such arbitrator on the ground that the arbitrator is an employee advocate and/or a person whose working for the developer. the proceeding of the arbitrator shall be concluded in accordance with the provision of the arbitration and conciliation act, 1996, as amended from time to time or Los beat thereafter. the allot is here by gives his consent to the appointment of the sole arbitrator specified here in above and waves any objection that he may have to search appointment go to the award that may be given by the arbitrator. the venue of the arbitration Shelby of New Delhi and language of arbitration shall be English. It is here by clarified that during the arbitration proceeding the company and the allottees shall continue to perform their respective rights and obligations under the agreement ...."*

17. The respondent contended that as per the terms & conditions of the agreement duly executed between the parties, it was specifically agreed

that in the eventuality of any dispute, if any, with respect to the provisional booked unit, the same shall be adjudicated through arbitration mechanism. The Authority is of the opinion that the jurisdiction of the Authority cannot be fettered by the existence of an arbitration clause in the buyer's agreement as it may be noted that Section 79 of the Act bars the jurisdiction of civil courts about any matter which falls within the purview of this Authority, or the Real Estate Appellate Tribunal. Thus, the intention to render such disputes as non-arbitrable seems to be clear. Also, Section 88 of the Act says that the provisions of this Act shall be in addition to and not in derogation of the provisions of any other law for the time being in force. Further, the Authority puts reliance on catena of judgments of the Hon'ble Supreme Court, particularly in ***National Seeds Corporation Limited v. M. Madhusudhan Reddy & Anr. (2012) 2 SCC 506*** and ***Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017***, wherein it has been held that the remedies provided under the Consumer Protection Act are in addition to and not in derogation of the other laws in force, consequently, the Authority would not be bound to refer parties to arbitration even if the agreement between the parties had an arbitration clause. Further, the arbitration clause in agreements between the complainant and builders could not circumscribe the jurisdiction of a consumer.

18. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the buyer agreement, the Hon'ble Supreme Court in case titled as ***M/s Emaar MGF Land Ltd. V. Aftab Singh in revision petition no. 2629-30/2018 in civil appeal no. 23512-23513 of 2017*** **decided on 10.12.2018** upheld the aforesaid judgement of NCDRC.

19. Therefore, in view of the above judgements and considering the provisions of the Act, the Authority is of the view that complainant is well within their right to seek a special remedy available in a beneficial Act such as the Consumer Protection Act and RERA Act, 2016 instead of going in for an arbitration. Hence, we have no hesitation in holding that this Authority has the requisite jurisdiction to entertain the complaint and that the dispute does not require to be referred to arbitration necessarily.

F.II Objection regarding delay due to force majeure circumstances

20. The respondent-promoter has raised a contention that the construction of the project was delayed due to force majeure conditions such as various orders passed by Hon'ble National Green Tribunal and State Pollution Control Board which issued various directions to builders to take additional precautions and steps to curtail pollution. On account of the aforementioned reasons, the progress of the work at the site was abruptly hampered. All these events led to suspension and stoppage of works on several occasions which also resulted in labourers and contractors abandoning work. As a result of various directions from the authorities at different occasions, regarding water shortage and pollution control etc., coupled with labourers and contractors abandoning the works; the respondent had to run from pillar to post in order to find new contractors and labourers, thus affecting the progress of the project. The respondent further submitted that since, there circumstances were beyond the control of respondent, so taking into consideration the above-mentioned facts, the said period be excluded while calculating the due date. But the plea taken in

this regard is not tenable. The due date for completion of project is calculated as per clause 7.1 of agreement which comes out to be 08.09.2016. Though there have been various orders issued by various competent authorities to curb the environment pollution, but these were for a short period of time and the fact that such type of orders are passed by the various competent Authorities from time to time were already known to the respondent-builder. Further, as far as relaxation on ground that labourers and contractors left the project due to such orders is also not tenable and is rejected, as it was the sole responsibility of the respondent-builder to arrange the contractor/labours to fulfil its obligation to complete the project within specified timelines. Further, grace period of 180 days as provided under clause 7.1 of agreement has been allowed being unconditional. Thus, no further grace period/leniency in this regard can be allowed to the respondent.

G. Findings on the relief sought by the complainants

Relief sought by the complainants:

G.I Direct the respondent to deliver the possession of the allotted unit.

21. The respondent has obtained the occupation certificate from the competent authority on 28.11.2019 and subsequently, offered the possession of the allotted unit vide letter dated 30.11.2019. As per section 19(10) of Act of 2016, the allottee is under an obligation to take possession of the subject unit within two months from the date of receipt of occupation certificate and in the instant complaint, the respondent has already offered the possession of the subject unit. The complainants are directed to take the

possession of the allotted unit within two months after payment of dues, if any after taking into consideration directions of the Authority w.r.t delay possession charges. The respondent shall handover the possession of the allotted unit as per specification of the buyer's agreement as entered into between the parties.

G.II Direct the respondent to pay interest on amount paid by the complainants at the prevailing rate of interest as per RERA.

22. 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, —*
>
> .....
>
> *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."*

23. Clause 7.1 of the agreement for sale dated 08.03.2013 provides for handing over of possession and is reproduced below:

> ***"Clause 7.1***
>
> *The Developer based on its present and estimates and subject to all just exceptions, proposes to complete construction/ development of the said project and handover the possession of the said Apartment to the Allottee* ***within a period of 36 months from the date of execution of this agreement unless there shall be any delay or failure due to force majeure*** *. The Allottee(s) understands and agrees that the developer shall be entitled for a* ***grace period of 180 days after the expiry of the aforesaid 36 months****. The Developer after completing the construction shall apply and obtain the occupation certificate in the in respect of the residential apartment(s) from the concerned authority. However, in case any condition arises that is beyond the control of the company including but not*

limited to force majeure condition, the remaining period available shall commence after the expiry of such condition....."

24. The Authority has gone through the possession clause of the agreement and observes that the respondents-developer proposes to handover the possession of the allotted unit within a period of 36 months from the date of execution of agreement. In the present case, the apartment buyer's agreement inter-se parties was executed on 08.03.2013; as such the due date of handing over of possession comes out to be 08.03.2016 without taking into consideration grace period of 180 days.

25. **Admissibility of grace period:** As per clause 7.1 of buyer's agreement dated 20.07.2012, the respondent-promoter proposed to handover the possession of the said unit within a period of 36 months along with grace period 180 days as grace period. The said clause is unconditional and provides that if the respondents is unable to complete the construction of the allotted unit within stipulated period of 36 months, then a grace period of 180 days shall be allowed to the respondent. The Authority is of view that the said grace period of 180 days shall be allowed to the respondents being unconditional. Therefore, as per clause 7.1 of the buyer's agreement dated 08.03.2013, the due date of possession comes out to be 08.09.2016.

26. **Admissibility of delay possession charges at prescribed rate of interest:** The complainants are seeking delay possession charges however, proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as

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

> ***Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]***
>
> *(1) For the purpose of proviso to section 12; section 18; and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%.:*

27. 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.

28. 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., 20.07.2023 is @ 8.75 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.

29. 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.*

30. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75 % by the respondent/promoter

which is the same as is being granted to them in case of delayed possession charges.

31. The Authority observes that it is an admitted fact that the subject unit of the complainants were cancelled vide letter dated 12.11.2014 on account of various defaults. However, the said cancellation was set-aside by the respondent himself on the request of the complainants. Thus, keeping in view principle of *Doctrine of Waiver* which finds its place under Section 63 of the Contract Act, 1872 *qua* relinquishment of rights between the parties. The rights that may be relinquished include obligations as well as claims that had been earlier consented to be performed and exercised by the parties. Thus, the waiver of right under Section 63 of the Contract Act has to be a matter of mutual consensus. In the present case, the respondent himself has waived of its right w.r.t. to cancellation letter dated 12.11.2014 by setting aside the same.

32. 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 7.1 of agreement for sale executed between the parties on 08.03.2013, the possession of the subject apartment was to be delivered within 36 months from date of agreement along with grace period of 180 days and the same comes out to be 08.09.2016. The respondent has offered the possession of the allotted unit on 30.11.2019 after obtaining occupation certificate from competent Authority on 28.11.2019.

33. Section 19(10) of the Act obligates the allottee to take possession of the subject unit within two months from the date of receipt of occupation

certificate. In the present complaint, the occupation certificate has been obtained from the competent Authority on 28.11.2019 and it has also offered the possession of the allotted unit on 30.11.2019. Therefore, in the interest of natural justice, the complainants should be given two months' time from the date of offer of possession. This two months' of reasonable time is to be given to the complainants keeping in mind that even after intimation of possession practically one has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 08.09.2016 till the expiry of two months from the date of offer of possession or till actual handing over of possession, whichever is earlier. The respondent-builder has already offered the possession of the allotted unit on 30.11.2019. Thus, delay possession charges shall be payable till offer of possession plus two months i.e. 30.01.2020.

Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the agreement for sale dated 08.03.2013 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., 08.09.2016 till offer of possession plus two months i.e. 30.01.2020; at the prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

34. Further, the respondent submitted that it has already made payment of Rs. 8,03,928/- towards delay possession charges to the complainants and the same are adjusted and included in amount paid of Rs. 62,58,352/-. The Authority observes that as per reminder letter dated 09.07.2020 on page no. 94-96 of reply, the total of amount paid by the complainants from 17.08.2011 to 22.06.2019 stands to Rs. 62,58,352/-. No credit entry w.r.t aforesaid amount can be traced. There is nothing on record that substantiate the fact that any such amount was adjusted by the respondent against delay possession charges. However, if any amount has already been paid/adjusted by the respondent to the complainants w.r.t delay possession charges, the same is entitled to be adjusted subject to furnishing of updated statement of accounts.

G. III Direct the respondent to pay Rs. 1,00,000/- as litigation cost.

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

the complainants may file a separate complaint before Adjudicating Officer under section 31 read with section 71 of the Act and rule 29 of the rules.

H. Directions of the Authority

36. 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):

a. The respondent shall pay interest at the prescribed rate i.e. 10.75 % per annum for every month of delay on the amount paid by the complainants from due date of possession i.e.; 08.09.2016 till the date of offer of possession (30.11.2019) plus two months i.e. 30.01.2020; as per proviso to section 18(1) of the Act read with rule 15 of the rules.

b. The respondent is entitled to adjust any amount which has been already been paid/adjusted by it towards consideration of subject unit on account of delay possession charges, subject to furnishing of updated statement of accounts.

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

d. The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e., 10.75 % 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.

e. The respondent/promoter is further directed to issue fresh statement of account after taking into consideration finding of the Authority w.r.t delay possession charges two weeks from date of this order.

f. The complainants are directed to pay outstanding dues, if any, in next one months and the respondent shall handover the possession of the allotted unit complete in all aspects as per specifications of buyer's agreement within next 30 days and if no dues remains outstanding, the possession shall be handed over within four weeks from date of this order.

g. The respondent is 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.

37. Complaint stands disposed of.

38. File be consigned to registry.

(Vijay Kumar Goyal)
Member

Haryana Real Estate Regulatory Authority, Gurugram
Dated: 20.07.2023