



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

Complaint no. :	1749 of 2022
Date of filing complaint:	25.04.2022
Order Reserve On:	06.07.2023
Order Pronounced On:	31.08.2023

1. Gaurav Soni 2. Santosh Soni Both RR/O: F-71, Major Shaitan Singh Colony, Jaipur (RJ)-302016	Complainants
Versus	
M/s ILD Millennium Pvt. Ltd. Office: B-418, F/F New Friends Colony, South Delhi, New Delhi-110065	Respondent
CORAM:	
Shri Vijay Kumar Goyal	Member
APPEARANCE:	
Shri Sukhbir Yadav (Advocate)	Complainants
Shri Rishabh Gupta (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottee 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 allottee 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 complainant, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name and location of the project	ILD Greens, Sector 37 C, Gurgaon, Haryana
2.	Nature of the project	Group Housing Colony
3.	Project area	15.4829 acres
4.	DTCP license no.	13 of 2008 dated 31.01.2008
5.	Name of licensee	M/s Jubilant Malls Pvt. Ltd. and 3 others
6.	RERA Registered/not registered	Registered For 64621.108 sq. mtrs. for towers 2,6 and 7, vide no. 60 of 2017 issued on 17.08.2017 up to 16.08.2018
7.	Unit no.	1402, 13 th Floor, Tower-7 (Page no. 68 of complaint)
8.	Unit area admeasuring (super area)	1365 sq. ft. (Page no. 68 of complaint)
9.	Date of buyer's agreement	05.07.2018 (Page no. 66 of complaint)
10.	Date of tripartite agreement	27.07.2018 (Page no. 133 of complaint)
11.	Possession clause	7. POSSESSION OF THE UNIT FOR RESIDENTIAL USAGE

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		<p>“The Company agrees and understands that timely delivery of possession of the unit to the Allottee and the Common areas to the association of allottees or the Authority, as case may be, as provided under the Real Estate Act is the essence of the Agreement. The Company assures to handover possession of the Unit along with ready and complete Common areas with all specifications, amenities and facilities of the project in place on 31st August 2018, unless there is delay or failure due to Force Majeure Events, Court orders, Government policy/ guidelines or decisions.</p>
12.	Due date of possession	31.08.2018 [as per possession clause]
13.	Notice of cancellation	11.03.2022 (Page no. 156 of complaint)
14.	Total sale consideration	Rs. 61,76,625/- (Page no. 74 of agreement)
15.	Amount paid by the complainant	Rs. 53,87,546/- (As per receipts dated 06.07.2018, 24.08.2018, 24.08.2018)
16.	Occupation certificate	02.07.2021
17.	Offer of possession	Not offered

B. Facts of the complaint:

3. That in June 2018 complainant Gaurav Soni received a marketing call from a real estate agent, who represented himself as an authorized agent of the

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respondent party and allured for a booking in a residential flat in the project "ILD GREENS", situated at Sector 37C, Gurugram.

4. That on believing the representation and assurance of respondent, the complainants Gaurav Soni and Santosh Soni booked a 2 BHK apartment/flat bearing no. 1402, in tower 7, admeasuring 1365 sq. ft. in the project "ILD GREENS" situated at sector 37C, Gurugram and signed a pre-printed booking application form on 06.07.2018 and paid Rs. 6,79,552/- as booking amount. The flat/apartment was purchased under the subvention payment plan for a sale consideration of Rs. 61,76,625/-.
5. That on 06.07.2018, the respondent issued an allotment letter in the name of Gaurav Soni and Santosh Soni, conforming to the allotment of apartment no. -1402, tower -07, 13th floor, ILD Greens for size admeasuring 1365 sq. ft. for in the project "ILD Greens" situated at sector - 37C.
6. That on 05.07.2018, a pre-printed, unilateral, arbitrary flat buyer agreement/buyer's agreement was executed inter-se the respondent and the complainants. According to clause 7(i) of the flat buyer agreement, the respondent was assured to hand over possession of the unit along with a ready and complete common area with all specifications, amenities, and facilities of the project on or before **31st August 2018**. Therefore, the due date of possession was 31.08.2018.
7. That on 13.07.2018 complainants raised a demand of Rs. 47,07,994/- and they availed a home loan from HDFC Ltd. (NBFC referred by respondent) under the interest subvention scheme and the HDFC released the demand amount Rs. 47,07,994/- on 23.08.2018 and the respondent issued two payment receipts dated 24.08.2018 for Rs. 44,33,310/- and Rs. 2,74,684/- respectively.

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8. That as per the respondent's interest subvention payment plan a tripartite agreement was executed between the complainant, builder, and HDFC. As per said TPA, the respondent assured both the parties i.e., banker and allottee, to pay the Pre-EMI till 30.04.2019. On the one hand, the respondent assured to deliver the possession of unit by 31.08.2018, and on other hand given Pre-EMI/Interest Subvention till 30.04.2019, the said dates show that the respondent/builder and the HDFC are hands in glove to induce and cheat the innocent allottees/complainant. The respondent and the HDFC knew this fact at the time of booking and granting and disbursing the loan that it will fail to hand over the possession of the fully developed flat by 31.08.2018.
9. That on 24.08.2018, the respondent issued a letter with the subject "Subvention Interest". As per said letter, the respondent assured that the company/respondent shall bear the interest payment till the date of the offer of possession.
10. That till 24.08.2018, the complainant had paid Rs. 53,87,546/- i.e., 87% of the total cost of the flat.
11. That on 06.03.2019, the complainants sent a grievance email to the respondent and asked for possession of the flat and interest under the subvention scheme.
12. Thereafter, the complainants sent several emails to the respondent from 22.03.2019 to 04.08.2021 and again requested to pay the pre-EMI to HDFC or pay to the complainants as per the agreed payment plan, till the date of possession, but the respondent never paid any heed to the complainant's emails and calls.
13. Thereafter, on 11.03.2022, the respondent sent a unit cancellation notice to the complainants in this letter respondent mentioned that there has been

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consistent default in payment of EMIs by the complainants to the bank from which you have availed home loan which has resulted in the said property as NPA. But it is pertinent to mention here that under the Interest Subvention scheme the respondent is only liable for paying the interest before the offer of possession of the said flat. That the complainants send a reply and said that as per the tri-party agreement the builder shall pay all the PRE-EMIs to HDFC bank until possession of the flat. But the respondent failed to honour its commitments.

14. That HDFC Ltd. issued a letter on 31.03.2022 and direct a timely payment of the loan amount of Rs. 8,65,931/- said "make regular repayments of the loan in terms of EMIs/PEMIs under your loan account, till the time of full and final closure of the loan along with the costs and interest" which was sent by email.
15. That on 09.04.2022 the respondent sends an email and claimed that the occupancy certificate for Tower 6&7, ILD Greens has been obtained.
16. That the main grievance of the complainants in the present complaint is that despite the complainants paying more than 87% of the actual cost of the flat and is ready and willing to pay the remaining amount (due if any), the respondent party has failed to deliver the possession of the flat along with the proposed amenities.
17. That the complainants do not want to withdraw from the project. The promoter has not fulfilled his obligation therefore as per obligations on the promoter under section 18(1) proviso, the promoter is obligated to pay the interest at the prescribed rate for every month of delay till the handing over of the possession.

C. Relief sought by the complainant:

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18. The complainant has sought following relief(s):

- (i) To set aside the cancellation of the allotment of apartment no. 1402 in tower 7 in the project.
- (ii) To get possession of the fully developed/constructed flat/ apartment with all amenities.
- (iii) To get pre- EMI from 01.04.2019 to offer of possession (the respondent can directly pay to HDFC or to the complainants).
- (iv) To get the delayed possession interest @ prescribed rate from due date of possession i.e., 31.08.2018 till the actual date of handing over of possession.
- (v) To get the area calculation of the flat (super area, carpet area, and common loading).

D. Reply by respondent/promoter:

The respondent/promoter by way of written reply made following submissions:

19. That at the outset each and every averment, statement, allegation, contention of the complainant which is contradictory and inconsistent with the reply submitted by the respondent/promoter is hereby denied and no averment, statement, allegation, contention of the complainant shall deem to be admitted save as those specifically admitted being true and correct. It is respectfully submitted that the same be treated as a specific denial of the complaint. The respondent/promoter is a leading real estate company aiming to provide state of art housing solutions to its customers and have achieved a reputation of excellence for itself in the real estate market.
20. That the complainant herein, have failed to provide the correct/complete facts and the same are reproduced hereunder for proper adjudication of the

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present matter. That the complainant is raising false, frivolous, misleading and baseless allegations against the respondent with intent to make unlawful gains.

21. At the outset in 2018, the complainant herein, learned about the project launched by the respondent/promoter titled as 'ILD Greens' (herein referred to as 'Project') and approached the respondent/promoter repeatedly to know the details of the said project. The complainant further inquired about the specification and veracity of the project and was satisfied with every proposal deemed necessary for the development of the project.
22. That after having keen interest in the project constructed by the respondent/promoter the complainant herein vide application dated 06.07.2018 booked an apartment bearing no. 1402, tower 7, 13th floor, admeasuring 1365 sq. ft. in the project Sector-37 C, Gurugram, Haryana.
23. That on 06.07.2018 an allotment letter was given to the complainant wherein confirming and provisionally allotted the apartment no. 1402, Tower 7, 13th floor, admeasuring 1365 sq. ft. in the project sector-37 C, Gurugram. On 05.07.2018, a builder buyer agreement (herein referred to agreement') was executed between the complainant and the respondent wherein the unit no. 1402, Tower 7, 13th floor, admeasuring 1365 sq. ft. in the project sector-37 C, Gurugram.
24. That the respondent after duly obtaining the occupation for tower 6 & 7 duly reminded the complainant to take possession in stipulated time period as per the terms and conditions of the builder buyer agreement, despite repetitive reminders dated 15.03.2021 by the respondent to the complainants, the complainants wilfully and intentionally absconded the reminders of the respondent and failed to pay the dues 22.09.2021 till date.

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25. That the respondent herein had been running behind the complainant for the timely payment of instalment due towards the respective unit in question. That inspite being aware of the payment schedule the complainant herein has failed to pay the instalment on time.
26. That the complainants defaulted in making payments as per the payment scheduled linked to the builder buyer agreement as well as failed to take the possession of the apartment being offered by the respondent in resultant the respondent had to cancel the allotment of the said unit by following the due course of terms and conditions of the builder buyer agreement.
27. That the construction work of the said project is completed around 40-50% in totally. The majority of prospective buyers in the said project failed to make the payments as per the payment schedule attached to the agreement which eventually resulted in the delay in construction process. That the respondent with the availability of funds is carrying the construction and the construction of the project is at full swing despite the defaults of the prospective buyers, which is a matter of concern and hence the complainants are themselves liable for the said delay in the handing over of the possession.
28. That the project of the respondent/promoter got delayed due to reasons beyond control of the respondent. It was further submitted that major reason for delay for the construction and possession of project is lack of infrastructure in the said area. The twenty-four- meter sector road was not completed on time. Due to non- construction of the sector road, the respondent faces many hurdles to complete the project. For completion of road, the respondent the Govt. Department/machinery and the problem is beyond the control of the respondent/promoter. The aforementioned road has been recently constructed.

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29. That the building plan has been revised on 16.06.2014 vide Memo No. ZP370/AD(RA)/2014/16 dated 16/06/2014 and further revised on 21.09.2015 vide Memo No. ZP370/AD(RA)/2015/18145 dated 21/09/2015. It is further submitted that the building plan has been changed for the benefit of the purchaser/allottee and due to this reason the project got delayed.
30. That in the agreement, the respondent had inter alia represented that the performance by the company of its obligations under the agreement was contingent upon approval of the unit plans of the said complex by the Director, Town & Country Planning, Haryana, Chandigarh and any subsequent amendments/modifications in the unit plans as may be made from time to time by the Company & approved by the Director, Town & Country Planning, Haryana, Chandigarh from time to time.
31. That due to ban levied by the competent authorities, the migrant labourers were forced to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Despite, after lifting of ban by the Hon'ble court the construction activity could not resume at full throttle due to such acute shortage.
32. That the project was not completed within time due to the reason mentioned above and due to several other reasons and circumstances absolutely beyond the control of the respondent, such as, interim orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble High Court of Punjab & Haryana in CWP No. 20032/2008 whereby ground water extraction was banned in Gurgaon, orders passed by National Green Tribunal to stop construction to prevent emission of dust in the month of April, 2015 and again in November, 2016, adversely affected the progress of the project.

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33. In past few years construction activities have also been hit by repeated bans by the Courts/Tribunals/Authorities to curb pollution in Delhi-NCR Region. In the recent past the Environmental Pollution (Prevention and Control) Authority, NCR (EPCA) vide its notification bearing no. EPCA-R/2019/L- 49 dated 25.10.2019 banned construction activity in NCR during night hours (6 pm to 6 am) from 26.10.2019 to 30.10.2019 which was later on converted to complete ban from 1.11.2019 to 05.11.2019 by EPCA vide its notification bearing no. R/2019/L- 53 dated 01.11.2019.
34. The Hon'ble Supreme Court of India vide its order dated 04.11.2019 passed in writ petition bearing no. 13029/1985 titled as "MC Mehta vs. Union of India" completely banned all construction activities in Delhi-NCR which restriction was partly modified vide order dated 09.12.2019 and was completely lifted by the Hon'ble Supreme Court vide its order dated 14.02.2020. These bans forced the migrant labourers to return to their native towns/states/villages creating an acute shortage of labourers in the NCR Region. Due to the said shortage the Construction activity could not resume at full throttle even after the lifting of ban by the Hon'ble Apex Court.
35. The demonetization and new tax law i.e., GST, affected the development work of the project. In the view of the facts stated above it is submitted that the respondent/promoter has intention to complete the project soon for which they are making every possible effort in the interest of allottees of the project.
36. Even before the normalcy could resume the world was hit by the Covid-19 pandemic. Therefore, it is safely concluded that the said delay in the seamless execution of the project was due to genuine force majeure circumstances and such period shall not be added while computing the delay.

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37. The Covid-19 pandemic has resulted in serious challenges for the project with no available labourers, contractors etc. for the construction of the project. The Ministry of Home Affairs, GOI vide notification dated 24.03.2020, bearing no. 40-3/2020- DM-I(A) recognized that India was threatened with the spread of Covid-19 pandemic and ordered a completed lockdown in the entire country for an initial period of 21 days which started on March 25,2020. By virtue of various subsequent notifications, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continues in some or the other form to curb the pandemic. Various State Governments, including the Government of Haryana have also enforced various strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial activities, stopping all construction activities. Pursuant to the issuance of advisory by the GOI vide office memorandum dated May 13, 2020, regarding extension of registrations of real estate projects under the provisions of the RERA Act, 2016 due to "Force Majeure", the Haryana Real Estate Regulatory Authority has also extended the registration and completion date by 6 months for all real estate projects whose registration or completion date expired and or was supposed to expire on or after March 25, 2020.
38. After such obstacles in the construction activity and before the normalcy could resume the entire nation was hit by the World wide Covid-19 pandemic. Therefore, it is safely concluded that the said delay in the seamless execution of the project was due to genuine force majeure circumstances.
39. That the current covid-19 pandemic resulted in serious challenges to the project with no available labourers, contractors etc. for the construction of the Project. That on 24.03.2020, the Ministry of Home Affairs, GOI vide



notification bearing no. 40-3/2020-DM- I (A) recognized that entire nation was threatened with Covid-19 pandemic and ordered a completed lockdown in the entire country for an initial period of 21 days which started on 25.03.2020. Subsequently, the Ministry of Home Affairs, GOI further extended the lockdown from time to time and till date the same continues in some or the other form to curb the pandemic. It is to note, various State Governments, including the Government of Haryana have also imposed strict measures to prevent the pandemic including imposing curfew, lockdown, stopping all commercial activities, stopping all construction activities.

40. The respondent/promoter herein had been running behind the complainant for the timely payment of instalment due towards the respective unit in question. That in spite being aware of the payment schedule the complainant herein has failed to pay the instalment on time.
41. That the respondent/promoter is committed to complete the development of the project at the earliest for which every necessary action is being taken by the respondent/promoter. It is further submitted that as the development of the project was delayed due to the reasons beyond the control of the respondent/promoter, the complainant is not entitled to any relief in any way and the same was agreed into between the complainant and the respondent.
42. That, it is evident that the entire case of the complainant is nothing but a web of lies and the false and frivolous allegations made against the respondent/promoter are nothing but an afterthought and a concocted story, hence, the present complaint filed by the complainant deserves to be dismissed with heavy costs.

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43. 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 those undisputed documents and written submissions made by the parties and who reiterated their earlier version as set up in the pleadings.

E. Jurisdiction of the authority:

44. The authority has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

45. 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

46. 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:

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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.

47. 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 complainant at a later stage.

F. Findings on the objections raised by the respondent/promoter:

F. I Objections regarding delay due to force majeure:

49. The respondent-promoter raised the contention that the construction of the project was delayed due to conditions beyond the control of the respondent/promoter such as non-construction of sector road by Government, interim orders dated 16.07.2012, 31.07.2012 and 21.08.2012 of the Hon'ble High Court of Punjab & Haryana in CWP No. 20032/2008 whereby ground water extraction was banned in Gurgaon, orders passed by National Green Tribunal to stop construction to prevent emission of dust in the month of April, 2015 and again in November, 2016 along with demonetization and new tax law i.e., GST, affected the development work of the project. First of all, the orders of High Court in the year 2012 does not have any impact on the project as the same was passed even before the apartment buyer's agreement was executed between the parties. Further, the orders banning construction and extraction of ground water were imposed for a very short duration and thus, a delay of such a long duration cannot be justified by the same. The plea regarding delay due to GST and demonetisation is also devoid of merit and thus, all the pleas stand rejected. Thus, the promoter-respondent cannot be given any leniency on based of aforesaid reasons and it is well settled principle that a person cannot take benefit of his own wrong.

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G. Entitlement of the complainant for delayed possession charges:

- G. I To set aside the cancellation of the allotment of apartment no. 1402 in tower 7 in the project.**
- G. II To get possession of the fully developed/constructed flat/ apartment with all amenities.**
- G.III To get the delayed possession interest @ prescribed rate from due date of possession i.e., 31.08.2018 till the actual date of handing over of possession.**

48. In the present complaint, the complainants intend to continue with the project and are seeking delay possession charges at prescribed rate of interest on amount already paid by them as provided under the proviso to section 18(1) of the Act which 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."

49. Clause 7 of the buyer's agreement (in short, the agreement) dated 05.07.2018, provides for handing over possession and the same is reproduced below:

7. POSSESSION OF THE UNIT FOR RESIDENTIAL USAGE

*"The Company agrees and understands that timely delivery of possession of the unit to the Allottee and the Common areas to the association of allottees or the Authority, as case may be, as provided under the Real Estate Act is the essence of the Agreement. The Company assures to handover possession of the Unit along with ready and complete Common areas with all specifications, amenities and facilities of the project in place on **31st August 2018**, unless there is delay or failure due to Force Majeure Events, Court orders, Government policy/ guidelines or decisions..."*

50. That the complainants on 06.07.2018 booked a unit in the project of the respondent namely, ILD Greens situated at sector-37 C, Gurgaon for a total sale consideration of Rs. 61,76,625/- out of which they have paid an amount of Rs. 53,87,546/-. The buyer's agreement was executed between the parties

on 05.07.2018. Thereafter, on 01.06.2018 the tripartite agreement was executed between the complainant, builder and the financial institution. As per possession clause 7 of the builder buyer agreement the unit was to be handed over by 31.08.2018. The respondent/ builder on 11.03.2022 sent a notice of cancellation to the complainant stating that due to non-payments of pre-EMI and EMI's by the complainants to bank has resulted the said property as NPA. Before proceeding further, the authority has to consider whether cancellation of the unit is valid or not.

- **Whether cancellation of the allotted unit is valid or not.**

51. The complainants have stated that as per the tri-partite agreement the builder shall pay all the Pre-EMIs/EMI's to HDFC bank from the date of first disbursement till 30.04.2019. Thereafter, a letter was issued by builder on 24.08.2018 stating that the subvention interest payments shall be borne by the company till the date of offer of possession. The respondent failed to honour its commitments and sent a cancellation notice to the complainants on 11.03.2022. The relevant clause of the tripartite agreement is reproduced hereunder for ready reference:

The Borrower has informed HDFC of the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability of payments under the Loan Agreement as payable by the Borrower to HDFC from the date of first disbursement till 30.04.2019 (the period be referred to as the 'Liability Period' and the Liability be referred to As " Assumed Liability") It is however Agreed that during the liability period the repayment liability is joint and several by and between the Borrower and the builder. The Assumption of liability by the Builder in no manner whatsoever Releases, Relinquishes and/ or Reduces the liability of the Borrower and that same shall not be affected in any manner on account of any difference and/or dispute between the borrower and the Builder under the arrangement between them.

52. Moreover, the relevant portion of the letter dated 24.08.2018 issued by the respondent/ builder is reproduced hereunder for ready reference:





You are valued customer and as desired by your good self, we hereby confirm that you have opted for the subvention payment plan and as per the plan all your subvention interest payments shall be borne by the Company till the date of offer of Possession in respect of your Flat No. 1402 in Tower 07 at our project 'ILD Greens, Sector-37, Gurugram.

53. The authority observes that the respondent/builder is obligated to pay Pre EMI's/EMI's till the offer of possession. Moreover, the respondent company has received the occupation certificate on 02.07.2021 but the respondent has not issued a valid offer of possession to the complainant/allottees. The respondent only on 03.07.2021 sent an email to the complainants stating "It gives us immense pleasure to inform you that the occupancy certificate for tower 6 & 7, ILD Greens has been obtained. We shall intimate the next steps to you shortly." Therefore, in such situation merely an email dated 03.07.2021 shall not be considered as a valid offer of possession.
54. Moreover, the respondent sent a cancellation notice on 11.03.2022 but prior to the said cancellation neither any demands/reminder notice nor any pre cancellation notice were issued by the respondent/builder. On 31.08.2023, the counsel for the respondent has been clarified that no offer of possession has been made by the respondent to the complainants. So, in such circumstances the cancellation of the unit is held to be invalid. The respondent/builder is directed to restore the unit of the complainants within a period of 30 days from the date of this order.
55. **Admissibility of delay possession charges at prescribed rate of interest:**
The complainants are seeking delay possession charges, 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.

56. 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.
57. 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., 31.08.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75% per annum.
58. 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;"*

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59. Therefore, interest on the delay payments from the complainants shall be charged at the prescribed rate i.e., 10.75% p.a. by the respondent/promoter which is the same as is being granted to the complainants in case of delay possession charges.
60. On consideration of the circumstances, the evidence and other record and submissions made by the parties, 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. It is a matter of fact that buyer's agreement executed between the parties on 05.07.2018, the possession of the booked unit was to be delivered on 31.08.2018 as per the possession clause.

G. IV To get pre-EMI from 01.04.2019 to offer of possession (the respondent can directly pay to HDFC or to the complainants).

61. A tripartite agreement ("TPA") dated 27.07.2018 was executed between the allottee, builder and financial institution. The allottees have alleged that builder shall pay all the Pre-EMIs/EMI's to the financial institution till offer of possession.
62. The relevant clause of the tripartite agreement is reproduced hereunder for ready reference:

The Borrower has informed HDFC of the scheme of arrangement between the Borrower and the Builder in terms whereof the Builder hereby assumes the liability of payments under the Loan Agreement as payable by the Borrower to HDFC from the date of first disbursement till 30.04.2019 (the period be referred to as the 'Liability Period' and the Liability be referred to As " Assumed Liability") It is however Agreed that during the liability period the repayment liability is joint and several by and between the Borrower and the builder. The Assumption of liability by the Builder in no manner whatsoever Releases, Relinquishes and/ or Reduces the liability of the Borrower and that same shall not be affected in any manner on account of any difference and/or dispute between the borrower and the Builder under the arrangement between them.

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63. Thereafter, the respondent/builder issued a letter dated 24.08.2018. The relevant portion of the letter issued by the respondent/ builder is reproduced hereunder for ready reference:

*You are valued customer and as desired by your good self, we hereby confirm that you have opted for the subvention payment plan and as per the plan all your subvention interest payments shall be borne by the Company **till the date of offer of Possession** in respect of your Flat No. 1402 in Tower 07 at our project 'ILD Greens, Sector-37, Gurugram.*

64. So, in such circumstances the authority observes that the respondent/builder is obligated to pay Pre EMI's/EMI's till the offer of possession.
65. The authority further observes that now, the proposition before the Authority whether an allottee who is getting/entitled for Pre EMI's/EMI's even after expiry of due date of possession, is entitled to both Pre EMI's/EMI's as well as delayed possession charges?
66. To answer the above proposition, it is worthwhile to consider that the Pre EMI's/EMI's is payable to the allottee on account of a provision in the BBA or in a TPA having reference of the BBA or an addendum to the BBA/TPA or allotment letter. The Pre EMI's/EMI's in this case is payable from the date of First disbursement till offer of possession. The rate at which Pre EMI's/EMI's has been committed by the financial institution is 8.85% per annum which is more than reasonable in the present circumstances. If we compare this Pre EMI's/EMI's with delayed possession charges payable under proviso to section 18 (1) of the Real Estate (Regulation and Development) Act, 2016, the delayed possession charges are much better i.e., the delayed possession charges in this case are payable at the rate of more than 10.75% whereas the Pre EMI's/EMI's are payable at the rate of 8.85% per annum. By way of Pre EMI's/EMI's, the promoter has assured the allottee that they will be entitled for this specific amount till offer of possession. Accordingly, the interest of

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the allottee is protected even after the due date of possession is over as the delayed possession charges are payable till offer of possession. The purpose of delayed possession charges after due date of possession is over and payment of Pre EMI's/EMI's after due date of possession is over as the same to safeguard the interest of the allottee as his money is continued to be used by the promoter even after the promised due date and in return, he is paid either the Pre EMI's/EMI's or delayed possession charges whichever is higher.

Accordingly, the authority decides that in cases where delayed possession charges is reasonable and comparable with the Pre EMI's/EMI's, allottee is entitled under section 18 and is payable even after due date of possession is over till offer of possession then after due date of possession is over, the allottee shall be entitled only Pre EMI's/EMI's or delayed possession charges whichever is higher without prejudice to any other remedy including compensation.

67. The authority directs the respondent/promoter to pay delayed possession charges from the due date of possession till offer of possession. Accordingly, 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 complainants are entitled to delayed possession charges at the prescribed rate of interest i.e., 10.75% p.a. for every month of delay on the amount paid by them to the respondent from the due date of possession i.e., 31.08.2018 till the valid offer of possession of the subject unit or handing over of possession plus two months whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules.

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G.V. To get the area calculation of the flat (super area, carpet area, and common loading).

68. As per section 19(1) of Act of 2016, the allottee shall be entitled to obtain information relating to sanctioned plans, layout plans along with specifications approved by the competent authority or any such information provided in this Act or the rules and regulations or any such information relating to the agreement for sale executed between the parties. Therefore, the respondent promoter is directed to provide the area calculation relating to super area, loading and carpet area to the complainant.

H. Directions of the Authority:

69. Hence, the authority hereby passes this order and issue the following directions under section 37 of the Act to ensure compliance of obligations cast upon the promoters as per the functions entrusted to the Authority under Section 34(f) of the Act of 2016:

- i) The respondent is directed to restore the allotted unit within a period of 30 days from the date of this order and hand over the physical possession along with updated statement of account.
- ii) The respondent is directed to pay interest at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 31.08.2018 till the offer of possession of the subject unit or handing over of possession plus two months whichever is earlier as per the provisions of section 18(1) of the Act read with rule 15 of the rules.
- iii) The respondent is directed to adjust the amount paid on account of Pre EMI's/EMI's from the delayed possession charges and shall return the balance amount to the complainant.
- iv) The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest

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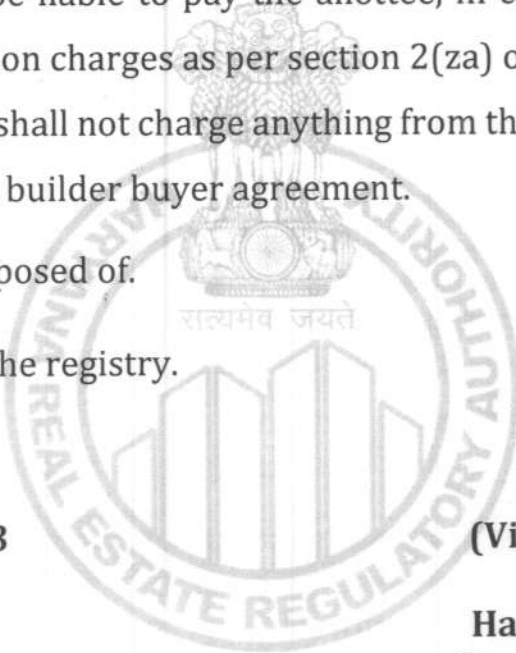
to be paid till date of handing over of possession shall be paid on or before the 10th of each succeeding month.

- v) The complainants are also directed to pay the outstanding dues after adjustment of delay possession charges, if any.
- vi) The rate of interest chargeable from the allottee 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 allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- vii) The respondent shall not charge anything from the complainants which is not part of the builder buyer agreement.

70. Complaint stands disposed of.

71. File be consigned to the registry.

Dated: 31.08.2023



V.I. -

(Vijay Kumar Goyal)

Member

**Haryana Real Estate
Regulatory Authority,
Gurugram**