

2016 (for short Act of 2016) read with Rule 28 of The Haryana Real Estate (Regulation & Development) Rules, 2017 for violation or contravention of the provisions of the Act of 2016 or the Rules and Regulations made thereunder, wherein it is inter-alia prescribed that the promoter shall be responsible to fulfil all the obligations, responsibilities and functions towards the allottee as per the terms agreed between them.

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, delay period, if any, have been detailed in the following table:

S.No.	Particulars	Details
1.	Name of the project	Park Elite Floors, Faridabad.
2.	RERA registered/not registered	Not registered

3.	Unit no.	P4-07-FF
4.	Unit area	1418 square ft (Super Area)
5.	Date of allotment	24.12.2009
6.	Date of builder buyer agreement	09.08.2010
7.	Due date of offer of possession (24 months)	09.08.2012 (Grace period of 6 months is not included)
8.	Possession clause in BBA	Subject to Clause 13 herein or any other circumstances not anticipated and beyond the control of the seller/confirming party or any restraints/restrictions from any courts/authorities but subject to the purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement including but not limited to timely payment of Total Sale Consideration and stamp duty and other charges and having complied with all provisions, formalities, documentations etc., as prescribed by the Seller Confirming Party, whether under this agreement or otherwise from time to time, the Seller/Confirming Party proposes to offer the handing over the physical possession of Floor to the Purchaser(s) within a period of twenty four (24) months from the date of execution of floor buyer agreement or on completion of payment of 35% of the basic sales price along with

		20% of EDC and IDC by the purchaser(s) whichever is later. The Purchaser(s) agrees and understands that the Seller/ Confirming Party shall be entitled to a grace period of (180) one hundred and eighty days, after the expiry of thirty (24) months, for filing and pursuing the grant of an occupation certificate from the concerned authority. The Seller/Confirming Party shall give a Notice of Possession to the Purchaser(s) with regard to the handing over of possession and in the event purchaser fails to accept and take the possession of the said floor within 30 days thereof the purchaser shall be deemed to be custodian of the said floor from the date indicated in the notice of possession and the said floor shall remain at the risk and cost of the Purchaser(s).
9.	Basic sale price	₹ 25,56,002/-
10.	Amount paid by complainant	₹ 27,38,754.77/-
11.	Offer of possession	21.11.2022 (as per written statement filed by respondent)

B. FACTS OF THE COMPLAINT

3. Facts of complaint are that complainants in the year 2009 applied for booking the floor in the real estate project named "Park Elite Floors", Faridabad by paying Rs. 3,00,000/- following which complainant was allotted unit no. P4-07-FF vide letter dated 24.12.2009.

4. Complainant entered into builder buyer agreement with the respondent on 09.08.2010. As per said agreement the respondent was supposed to hand over possession of the said unit on 09.02.2013 (including grace period of 180 days for filing and pursuing the grant of an occupation certificate). The complainant was supposed to pay the basic sales price of ₹ 25,56,002/-. Against said consideration, complainants have paid an amount of ₹ 27,38,754.77/-.
5. That respondent has failed to complete the project in time and the same is incomplete till date. Respondent has breached the fundamental term of contract by inordinately delaying in delivery of possession. The agreement was executed on 09.08.2010 and the project was to be completed in 24 months with grace period of six months. The respondent has 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. Said project is not complete even after passing of 13 years and will take another 2-3 years to get completed. Respondent had duped the innocent complainants by making false assurances.
6. The respondent has not provided possession of the flat. Therefore, complainants are left with no other option but to approach this Authority. Hence the present complaint has been filed.

C. RELIEF SOUGHT

7. The complainants in their complaint have sought following reliefs:
- i) Direct the Respondent to refund a sum of Rs.3,44,132.58/- along with interest of Rs.7,53,652/- compounded @18% per annum for the extra/increased area charges, despite the fact area is lesser than the area they defined in the brochure;
 - ii) Direct the Respondent to refund a sum of Rs.50,000/- charges as club charges without prior intimation or consent from Complainants;
 - iii) Direct the Respondent to pay the delayed interest of Rs.47,65,434/- compounded @18% per annum or the delayed period from the due date of possession as per the agreement till the date legal possession is being offered;
 - iv) Direct Respondent to offer the possession of the said Unit after obtaining the OC/CC as per the act;
 - v) Direct Respondent to pay the equitable penalty reimbursement paid by the Complainants for staying in rented accommodation and also giving interest to the bank against housing loan facility availed for purchasing the said Unit; and
 - vi) Pass any other order which this Authority may deem fit and proper in the light of facts of the present case.

D. REPLY SUBMITTED ON BEHALF OF RESPONDENT

Learned counsel for the respondent filed detailed reply on 08.02.2023 pleading therein:

8. That builder buyer agreement with complainants was executed much prior coming into force of Real Estate (Regulation and Development) Act, 2016. (RERA Act in brief). Therefore, agreement executed prior to coming into force of the Act or prior to registration of project with RERA cannot be reopened.
9. Respondent has admitted allotment and execution of floor buyer agreement in favor of complainants. Payment of Rs. ₹ 27,38,754.77/- has also been admitted by the respondent. It is stated that in terms of FBA dated 09.08.2010 respondent proposed to handover the possession of the unit within a period of 24 months from the execution of FBA or completion of payment of 35% of basic sales price along with 20% of EDC and IDC, whichever is later, along with further grace period of 180 days.
10. That respondent had duly informed the complainants with respect to the updates on construction along with photographs of the said project. Complainants were aware of the stage of construction and reasons for delay in handing over of the unit. Both parties on a mutual basis extended the date of possession of said unit.

11. That complainants are defaulter in terms of section 19 (6) and 19(7) of the Act.
12. Construction of the project was going on in full swing but it got effected due to the circumstances beyond control of the respondent such as NGT order prohibiting construction activity, ban on construction by Supreme Court of India in M.C Mehta v. Union of India, ban by Environment Pollution (Prevention and Control) Authority and Covid-19 etc.
13. It has been stated that as per clause 4.5 of the FBA it was duly agreed between the parties that if the respondent fails to complete construction within the agreed period due to force majeure circumstances and any other reason stated in the agreement and any other circumstances beyond the control of the respondent then complainant agrees that respondent shall be entitled to reasonable extension of time for completion of construction and delivery of possession of the said unit.
14. Respondent sent the offer of possession dated 21.11.2022 to the complainants with an additional demand of Rs. 10,42,152.41/-.

E. ARGUMENTS OF LEARNED COUNSEL FOR COMPLAINANT AND RESPONDENT

15. During oral arguments learned counsel for the complainants insisted upon possession of their booked unit along with delay interest. He

submitted that he is not pressing upon the relief no. 1, 2 and 5. Learned counsel for the respondent reiterated arguments as were submitted in written statement. He submitted that respondent has applied for Occupation Certificate with respect to complainant's booked unit on 10.11.2022. He offered to pay the delay interest @ 9% to the complainant which was outrightly denied by ld. counsel for the complainant.

F. Findings on the objections raised by the respondent.

F.I Objection regarding execution of BBA prior to the coming into force of RERA Act,2016.

16. One of the averments of respondent is that provisions of the RERA Act of 2016 will not apply on the agreements executed prior to coming into force of RERA Act,2016. Accordingly, respondent has argued that relationship of builder and buyer in this case will be regulated by the agreement previously executed between them and same cannot be examined under the provisions of RERA Act. In this regard, Authority observes that after coming into force the RERA Act, 2016, jurisdiction of the civil court is barred by Section 79 of the Act. Authority, however, is deciding disputes between builders and buyers strictly in accordance with terms of the provisions of flat-buyer agreements. After RERA Act of 2016 coming into force the terms of agreement are not re-written, the Act of 2016 only ensure that

whatever were the obligations of the promoter as per agreement for sale, same may be fulfilled by the promoter within the stipulated time agreed upon between the parties. Issue regarding opening of agreements executed prior to coming into force of the RERA Act, 2016 was already dealt in detail by this Authority in complaint no. 113 of 2018 titled as Madhu Sareen v/s BPTP Ltd decided on 16.07.2018.

Relevant part of the order is being reproduced below:

“The RERA Act nowhere provides, nor can it be so construed, that all previous agreements will be re-written after coming into force of RERA. Therefore, the provisions of the Act, the Rules and the Agreements have to be interpreted harmoniously. However, if the Act or the Rules provides for dealing with certain specific situation in a particular manner, then that situation will be dealt with in accordance with the Act and the Rules after the date of coming into force of the Act and the Rules. However, before the date of coming into force of the Act and the Rules, the provisions of the agreement shall remain applicable. Numerous provisions of the Act saves the provisions of the agreements made between the buyers and seller.”

Further, as per recent judgement of Hon'ble Supreme court in Newtech Promoters and Developers Pvt. Ltd Civil Appeal no. 6745-6749 of 2021 it has already been held that the projects in which completion certificate has not been granted by the competent Authority, such projects are within the ambit of the definition of on-

going projects and the provisions of the RERA Act,2016 shall be applicable to such real estate projects, furthermore, as per section 34(e) it is the function of the Authority to ensure compliance of obligation cast upon the promoters, the allottees and the real estate agents under this Act, and the rules and regulations made thereunder, therefore this Authority has complete jurisdiction to entertain the captioned complaint.

Execution of builder buyer agreement is admitted by the respondent. Said builder buyer agreement is binding upon both the parties. As such, the respondent is under an obligation to hand over possession on the deemed date of possession as per agreement and in case, the respondent failed to offer possession on the deemed date of possession, the complainant is entitled to delay interest at prescribed rate u/s 18(1) of RERA Act.

F.II Objections raised by the respondent regarding force majeure conditions.

17. The obligation to deliver possession within a period of 24 months from builder buyer agreement was not fulfilled by respondent. There is delay on the part of the respondent and the various reasons given by the respondent such as NGT order, Covid outbreak etc. are not convincing enough as the due date of possession was in the year 2012 and the NGT order referred by the respondent pertains to year 2016,

therefore respondent cannot be allowed to take advantage of the delay on his part by claiming the delay in statutory approvals/directions. As far as delay in construction due to outbreak of Covid-19 is concerned Hon'ble Delhi High Court in case titled as *M/s Halliburton Offshore Services Inc. vs Vedanta Ltd & Anr. bearing OMP (1) (Comm.) No. 88/2020 and I.A.s 3696-3697/2020* dated 29.05.2020 has observed that:

“69. The past non-performance of the contractor cannot be condoned due to Covid-19 lockdown in March,2020 in India. The contractor was in breach since septemeber,2019. Opportunities were given to the contractor to cure the same repeatedly. Despite the same, the contractor could not complete the project. The outbreak of pandemic cannot be used as an excuse for non-performance of a contract for which the deadline was much before the outbreak itself.

The respondent was liable to complete the construction of the project and the possession of the said unit was to be handed over by September,2019 and is claiming the benefit of lockdown which came into effect on 23.03.2020, whereas the due date of handing over possession was much prior to the event of outbreak of Covid-19 pandemic. Therefore, Authority is of view that outbreak of pandemic cannot be used an excuse for non-performance of contract for which deadline was much before the outbreak itself.”

So, the plea of respondent to consider force majeure conditions towards delay caused in delivery of possession is without any basis and the same is rejected.

Further, respondent has pleaded that complainant had already agreed vide builder buyer agreement to extend the timeline for offering possession of the unit. Said understanding had already been achieved between the parties at the stage of entering into the transaction (BBA). Hence, complainant and respondent on mutual basis extended the date of possession of unit to the complainant. In reference to it, clause 4.5 of BBA has been referred. Clause 4.5 of BBA is reproduced below for reference:-

"Clause 4.5-That if the seller/ Confirming party fails to complete the construction of the said colony and floor within the period as mentioned in this Agreement due to force majeure circumstances and any other reason stated in the Agreement and any other circumstances beyond the control of the seller/confirming party, then the purchasers agrees that the seller/ confirming party shall be entitled to reasonable extension of time for completion of construction of the colony and delivery of possession"

Above referred clause provides for extension of time for completion of construction of the colony and delivery of possession of unit due to force majeure circumstances and any other reason stated in the agreement. Since the respondent has failed to prove any force majeure conditions or any other circumstances attributing to delay caused in handing over of possession, the plea of respondent that both parties (complainant and respondent) on mutual basis extended the date of

possession of unit to the complainant does not hold any merit and the same is rejected.

G. Findings on the relief sought by the complainant

G.I Direct the respondent to pay delayed possession charges at the prescribed interest per annum from the deemed date of possession till actual delivery of possession of unit in question.

18. In the present complaint, the complainants intend to continue with the project and are seeking delayed possession charges as provided under the proviso to Section 18 (1) of the Act, Section 18 (1) proviso reads as under :-

“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”.

19. Clause 4.1 of BBA provides for handing over of possession and is reproduced below:-

Subject to Clause 13 herein or any other circumstances not anticipated and beyond the control of the seller/ confirming party or any restraints/restrictions from any courts/authorities but subject to the purchaser(s) having complied with all the terms and conditions of this Agreement and not being in default under any of the provisions of this Agreement including but not limited to timely payment of Total Sale Consideration and stamp duty and other charges and having complied with all provisions, formalities, documentations etc., as prescribed by the Seller Confirming Party, whether

under this agreement or otherwise from time to time, the Seller/Confirming Party proposes to offer the handing over the physical possession of Floor to the Purchaser(s) within a period of twenty four (24) months from the date of execution of floor buyer agreement or on completion of payment of 35% of the basic sales price along with 20% of EDC and IDC by the purchaser(s) whichever is later. The Purchaser(s) agrees and understands that the Seller/ Confirming Party shall be entitled to a grace period of (180) one hundred and eighty days, after the expiry of thirty (24) months, for filing and pursuing the grant of an occupation certificate from the concerned authority. The Seller/Confirming Party shall give a Notice of Possession to the Purchasers) with regard to the handing over of possession and in the event purchaser fails to accept and take the possession of the said floor within 30 days thereof the purchaser shall be deemed to be custodian of the said floor from the date indicated in the notice of possession and the said floor shall remain at the risk and cost of the Purchaser(s).

20. **Finding w.r.t grace period:** The promoter had agreed to handover the possession of the within 24 months from the date of execution of floor buyer agreement or on completion of 35% of the basic sale price alongwith 20% of EDC and IDC by the purchaser(s), whichever is later. The agreement further provides that promoter shall be entitled to a grace period of 180 days after expiry of 24 months for filing and pursuing the grant of occupation certificate with respect to the plot on which the floor is situated. Since; the later milestone for possession i.e. completion of 35% of the basic sale price alongwith 20% of EDC

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and IDC by the purchaser is vague, ambiguous and arbitrary, the date of execution of floor buyer agreement is taken as the date for calculating the deemed date of possession. As a matter of fact, the promoter did not apply to the concerned Authority for obtaining completion certificate/occupation certificate within the time limit prescribed by the respondent/promoter in the floor buyer agreement i.e immediately after completion of construction works within 24 months. Thus, the period of 24 months expired on 09.08.2012. As per the settled principle no one can be allowed to take advantage of its own wrong. Accordingly, this grace period of 180 days cannot be allowed to the promoter.

21. The definition of term 'interest' is defined under Section 2(za) of the Act which is as under:

(za) "interest" means the rates of interest payable by the promoter or the allottee, as the case may be.

Explanation.-For the purpose of this clause-

(i) the rate of interest chargeable from the allottee by the promoter, in case of default, shall be equal to the rate of interest which the promoter shall be liable to pay the allottee, in case of default;

(ii) the interest payable by the promoter to the allottee shall be from the date the promoter received the amount or any part thereof till the date the amount or part thereof and interest thereon is refunded, and the interest payable by the allottee to

the promoter shall be from the date the allottee defaults in payment to the promoter till the date it is paid;

22. 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.
23. Taking the case from another angle, the complainants-allottees were entitled to the delayed, possession charges/interest only at the rate of Rs.5/- per sq. ft. per month as per relevant clauses of the buyer's agreement for the period of such delay; whereas the promoter was entitled to interest @18% per annum compounded at the time of every succeeding installment for the delayed payments. The functions of the Authority are to safeguard the interest of the aggrieved person, may be the allottee or the promoter. The rights of the parties are to be balanced and must be equitable, the promoter cannot be allowed to take undue advantage of his dominant position and to exploit the needs of the home buyers. This Authority is obligated to take into consideration the legislative intent i.e. to protect the interest of the consumers /allottees in the real estate sector. The clauses of the buyer's agreement entered between the parties are one-sided, unfair and unreasonable with respect to the grant of interest for delayed

possession. There are various other clauses in the buyer's agreement which give sweeping powers to the promoter to cancel the allotment and forfeit the amount paid. Thus, the terms and conditions of the buyer's agreement are ex- face one-sided, unfair, and unreasonable, and the same shall constitute the unfair trade practice on the part of the promoter. These types of discriminatory terms and conditions of the buyer's agreement will not be final and binding. In these circumstances the complainant is entitled to interest at prescribed rate from the deemed date of possession till delivery of valid offer of possession.

24. Consequently, as per website of the State Bank of India i.e. <https://sbi.co.in>, the highest marginal cost of lending rate (in short, MCLR) as on date i.e. 03.05.2023 is 8.70%. Accordingly, the prescribed rate of interest will be highest marginal cost of lending rate +2% i.e., 10.70%.
25. Payment of delayed possession charges at the prescribed rate of interest.

Proviso to Section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate, as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under;

"Rule 15, Prescribed rate of interest- (Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]

(1) For the purpose of proviso to section 12; section 18, and sub-sections (4) and (7) of section 19, the "interest at the rate prescribed" shall be the State Bank of India highest marginal cost of lending rate +2%. Provided that in case the State Bank of India marginal cost of lending rate (NCLR) 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".

26. The Authority observes that the respondent has severely misused its dominant position. They executed the BBA in the year 2010. Due date of possession was 09.08.2012. As per the submissions of the respondent, possession was offered to the complainants on 21.11.2022 i.e. after filing of this complaint by the complainants on 15.11.2022. Said offer does not constitute a valid offer as it was without receiving occupation certificate. Ld. counsel for the respondent himself has submitted that respondent applied for occupation certificate on 10.11.2022 after completion of construction. Here in this case respondent is not able to offer valid possession to the complainants even after lapse of 10 years from the due date of possession. Complainants are interested in getting the possession of their apartment. They do not wish to withdraw from the project. In the circumstances, the provisions of Section 18 of the Act clearly come into play by virtue of which while exercising option of taking possession of the apartment the allottee can also demand, and respondent is liable to pay, monthly interest for the entire period of

delay caused at the rates prescribed. The respondent in this case has not made valid offer of possession to the complainants till date nor he has obtained the occupation certificate of the project in question. So, the Authority hereby concludes that the complainants are entitled for the delay interest from the deemed date i.e., 09.08.2012 to the date on which a valid offer is sent to them after obtaining occupation certificate.

27. Authority has got calculated the interest on total paid amount from the deemed date of possession till the date of this order at the rate of 10.70% till and said amount works out to ₹ 31,47,127/- as per detail given in the table below:

Sr. No.	Principal Amount	Deemed date of possession or date of payment whichever is later	Interest Accrued till 03.05.2023
1.	₹ 27,38,344.54/-	09.08.2012	31,46,771
2.	₹ 410.23/-	23.03.2015	356
	Total = ₹ 27,38,754.77		₹ 31,47,127/-
	Monthly interest		₹ 24,086/-

28. Accordingly, the respondent is liable to pay the upfront delay interest of Rs. 31,47,127/- to the complainant towards delay already caused in handing over the possession. Further, on the entire amount of Rs.

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27,38,754.77/- monthly interest of Rs. 24,086/- from 03.05.2023 shall be payable up to the date of actual handing over of the possession after obtaining occupation certificate. The Authority orders that the complainant will remain liable to pay balance consideration amount to the respondent when an offer of possession is made to him.

29. The complainants are seeking direction against respondent to pay the equable penalty reimbursement paid by the complainants for staying in rented accommodation and also giving interest to the bank against housing loan facility availed for purchasing the said Unit. It is observed that Hon'ble Supreme Court of India in Civil Appeal Nos. 6745-6749 of 2027 titled as "M/s Newtech Promoters and Developers Pvt. Ltd. V/s State of U.P. & ors." (supra.), 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 learned Adjudicating Officer as per section 71 and the quantum of compensation & litigation expense shall be adjudged by the learned Adjudicating Officer having due regard to the factors mentioned in Section 72. The adjudicating officer has exclusive jurisdiction to deal with the complaints in respect of compensation & legal expenses. Therefore, the complainants are advised to approach the Adjudicating Officer for seeking the relief of litigation expenses.

I. DIRECTIONS OF THE AUTHORITY

30. Hence, the Authority hereby passes this order and issues following directions under Section 37 of the Act to ensure compliance of obligation cast upon the promoter as per the function entrusted to the Authority under Section 34(f) of the Act of 2016:

(i) Respondent is directed to pay upfront delay interest of Rs. 31,47,127/- to the complainant towards delay already caused in handing over the possession within 90 days from the date of this order. Further, on the entire amount of Rs. 27,38,754.77/- monthly interest of Rs. 24,086/- from 03.05.2023 shall be payable by the respondent to the complainant up to the date of actual handing over of the possession after obtaining occupation certificate.

(ii) Complainants will remain liable to pay balance consideration amount to the respondent at the time of possession offered to her.

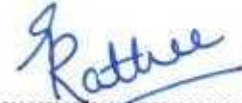
(iii) The rate of interest chargeable from the allottees by the promoter, in case of default shall be charged at the prescribed rate i.e, 10.70% by the respondent/ Promoter which is the same rate of interest which the promoter shall be liable to pay to the allottees.

(iv) The respondent shall not charge anything from the complainants which is not part of the agreement to sell.

31. **Disposed of.** File be consigned to record room after uploading on the website of the Authority.



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NADIM AKHTAR
[MEMBER]



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DR. GEETA RATHEE SINGH
[MEMBER]