



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

Order reserved on: 26.07.2023  
Date of pronouncement of order: 04.10.2023

1. Anchal Garg
2. Sunil Goyal

**Both R/O:-** House no. 1301, Ground floor, Sector-31,  
Gurugram Haryana at present Flat no. 702, Tower No.  
83, Emaar Palm Hills, Sector -77, Gurugram Haryana

**Complainants**

Versus

Almond Infrabuild Private Limited

**Address:-** Having Regd. Office a 711/92, Deepali  
Nehru Place, New Delhi-110019

**Respondent**

**CORAM:**

Shri Ashok Sangwan

**Member**

**APPEARANCE:**

Shri Shashi Kant Sharma  
Ms. Yamini

Advocate for the complainants  
Advocate for the respondent

**ORDER**

1. The present complaint dated 07.06.2022 has been filed by the complainants under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with Rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the provision of the



Act or the rules and regulations made there under or to the allottees as per the agreement for sale executed inter se.

**A. Project and unit 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, delay period, if any, have been detailed in the following tabular form:

S. N.	Particulars	Details
1.	Name of the project	"ATS Tourmaline", Sector- 109, Gurgaon
2.	Nature of project	Group housing project
3.	<b>DTPC License no.</b>	250 of 2007 dated 02.11.2007
	Validity status	01.11.2019
	Licensed area	19.768 acres
	Name of licensee	Raj Kiran & 2 others
4.	<b>RERA registered/not registered</b>	Registered vide registration no. 41 of 2017 dated 10.08.2017
	Validity status	10.08.2023
5.	Application dated	27.08.2013 [As per page no. 22 of complaint]
6.	Unit no.	4061 on 6 <sup>th</sup> floor of tower 04 [As per page no. 22 of complaint]



7.	Unit area admeasuring	1750 sq. ft. [Super area] [As per page no. 18 of complaint]
8.	Date of apartment buyer agreement	17.12.2013 [As per page no. 20 of complaint]
9.	Date of Duplicate apartment agreement buyer	20.09.2014 [As per page no. 54 of complaint] <i>The original buyer's agreement was misplaced, new buyer's agreement was executed inter-se parties.</i>
10.	Payment plan	Construction linked payment plan [As per page no. 87 of complaint]
11.	Total sale consideration	Rs. 1,42,68,750/- [As per payment plan annexed as schedule IV on page no. 87 of complaint]
12.	Amount paid by the complainant	Rs. 1,49,72,563/- [As alleged by the complainant on page no. 06 of complaint]
13.	Possession clause	<b>Clause 6.2 of 2<sup>nd</sup> agreement</b> <i>The Developer endeavour to complete the construction of the apartment <b><u>within 42 months from the date of this agreement</u></b> (completion date). The company will send possession notice and offer possession of the Apartment to the applicant as and when the company</i>



		<i>receives the occupation certificate from the competent authority.</i>
14.	Due date of possession	20.03.2018 [Calculated from the date of agreement i.e., 20.09.2014]
15.	Occupation certificate	09.08.2019 [As per page no. 40 of reply]
16.	Offer of possession	09.08.2019 [As per page no. 118 of complaint]
17.	Emails dated seeking possession of the allotted unit	02.12.2020, 10.01.2021, 08.04.2021, 17.01.2022 & 17.01.2022 (As per page no. 126-130 of complaint)
18.	Respondent reply to emails of the complainant	02.02.2022 (As per page no. 125 of complaint)

**B. Facts of the complaint**

3. The complainants made the following submissions in the complaint:

- i. That the respondent is a reputed developer and in the business of construction of Residential & Commercial units and after commencement of the project the respondent intended to sell the same to prospective buyers. Whereas the respondent has commenced a project namely "ATS TOURMALINE" at Sector 109, Gurugram.



- ii. That the respondent had advertised and represented that respondents are having well known project namely "TOURMALINE" at Sector 109, Gurugram where respondent is going to develop Flats under the categories of 3BHK/4BHK/5BHK/PENTA HOUSE. That on trusting upon pamphlets, inducement and advertisement of the respondent, complainants has shown their willingness to purchase a Flat in the said project of the respondent.
- iii. That complainants after going through the inducement of respondent's project wherein the respondent has given huge advertisement and offers on the project shown their willingness to book/purchase an apartment bearing no. 4061, measuring super area of 1750 sq. ft. (i.e. 162.58 sq. mtrs) on 6<sup>th</sup> floor, Tower 4, at Sale Consideration of Rs. 1,42,68,750/-. The said flat was booked on 13.05.2013 and thereafter the First Buyer's Agreement was also executed between complainants and respondent 17.12.2019 and the same was misplaced and later on the second and final builder buyer agreement was on 20.09.2014.
- iv. That as per terms and conditions of the Buyer's Agreement, respondents were supposed to handover the Flat within a period of 42 months date from the date of Buyer's agreement. It is respectfully submitted that the complainants have made a total sum of Rs. 1,49,72,563/- till date. That it is respectfully submitted that as per the clause no. 6.2 of BBA the respondent is liable to handover the possession of the flat on or before 19.03.2018. But despite repeated request of complainants, the respondent neither



delivered physical possession of the flat nor complete the flat till date. That after completion period the possession of the apartment was supposed to be delivered to complainant, but despite completion of the time it is observed that respondent miserably failed to give the possession of the flat till date. It is also respectfully submitted that the flat is still not in a condition to take possession till date.

- v. That the complainants paid the amount from time to time as and when such demands were raised by respondent. That on 09.08.2019 the respondent very kindly issued a letter of offer of possession wherein the respondent demanded a sum of Rs. 15,90,653/- and instructed to clear the outstanding within a period of 21 days i.e 30.08.2019. In the said offer of possession the respondent stated that on receipt of the entire payment the respondent will hand over the possession of the apartment with full furnished within a period of 90 days.
- vi. That the complainants cleared all the dues as demanded by the respondent and complainants also requested to furnish and ready the flat as soon as possible. That according to offer of possession letter 09.08.2019 respondent were supposed to handover the full furnished apartment within 90 days, but till date no physical possession intimation given by the respondent even the apartment is still not in condition to take possession.
- vii. That from November 2019 the complainants along with family members visit regarding to complete the furnishing work and handing over the flat but on each and every visit the respondent



continuously gave the answer that the finishing work is going on and the possession of the flat would be delivered very shortly. That when the complainant visited the flat personally and astonished to note that no work has been done by the respondent and the flat was in the same condition as before. That from November 2019 the complainant sent various reminders by mail in addition to telephonic calls, messages to complete the finishing work and handing over the possession of the flat, vide Emails dated 30.08.2019, 05.09.2019, 20.10.2020, 02.12.2020, 10.01.2021, 08.04.2021, 17.01.2022, 01.02.2022 but the respondent has not confirmed any confirm date for physical possession of the apartment. The complainant had communicated financial hardships owing to Bank EMIs leading to mental and financial distress with request to handover flat possession on priority. However there had been no update till date on the confirm date of physical possession of the flat.

- viii. That complainants had paid the hard-earned money with respondent, on the promise and inducement. That the respondent have cheated complainant with malafide intentions from the very beginning as respondent took the money from the pockets of the complainant by way of misrepresentation, inducement and commitment which were totally false and fake from the very beginning. It is very surprising that respondents have duly executed all the necessary documents but after completion of the documents and payments respondent have not honoured their commitment.



- ix. That complainants along with family members visited respondent as well as made various telephonic talks and through emails also requested to complete the work of the flat and handover the physical possession of the flat but respondents are adamant and have not completed the furnishing work and have not handed over the possession of the flat till date. From the above it revealed that respondents have cheated and defrauded the complainants from the very beginning to till date and wants to misuse the hard earned money of complainants. That due to delay in handing over the possession and cheating and fraud committed by respondent, complainants are no more interested to show their willingness to proceed further.
- x. That at the time of booking of the flat the sale cost indicated was Rs. 1,42,68,750/- and complainants total paid a sum of Rs. 1,49,72,563/- to the respondents and after completion of all the payments the respondent failed to handover the peaceful possession of the flat to the complainants till date. That in view of the above facts and circumstances of the case, it is evident that from the date of booking till today respondent is playing a game of cheating and fraud with applicants/complainants in order to grab the precious amount of applicants/complainants.
- C. The complainants are seeking the following relief:**
4. The complainants have sought the relief(s):





- (i) Direct the Respondent(s) to pay interest @ 10.75% per annum on the amount already paid by the complainant i.e., Rs. 1,49,72,563/- from 19.03.2018 till actual handover of the physical possession.

**D. Reply filed by the respondent**

5. The respondent had contested the complaint on the following grounds:

- i. The present complaint is neither maintainable nor tenable before this forum and is liable to be out rightly dismissed. The agreement in question was executed between the complainant and the respondent prior to the enactment of RERA, 2016 and the provisions laid down in the said Act cannot be enforced retrospectively.
- ii. That the complaint is not maintainable for the reason that the agreement contains an arbitration clause which refers to the dispute resolution mechanism to be adopted by the parties in the event of any dispute this Clause 21 of the buyer's agreement which is reproduced for the ready reference of this Hon'ble Forum:-

*"All or any dispute that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be under the Arbitration and Conciliation Act, 1996 and any statutory amendments/ modification thereto by a sole arbitrator who shall be mutually appointed by the Parties or if unable to be mutually appointed, then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties."*

- iii. That the complainant has not approached this Forum with clean hands and has intentionally suppressed and concealed the material



- facts in the present complaint. The present complaint has been filed by him malicious with an ulterior motive and it is nothing but a sheer abuse of the process of law.
- iv. That the respondent is a reputed real estate developer having immense goodwill comprise of law abiding and peace loving persons and has always believed in rendering best services to its customers including the complainant. The respondent alongwith its associate companies have developed and placed several prestigious projects such as ATS Greens-I, ATS Greens-II, ATS Village, ATS Paradiso, ATS Advantage Phase-I & Phase-II, ATS One Hamlet, ATS Pristine, ATS Prelude & ATS Dolce and in most of these projects large number of allottees have already been taken possession and even Resident Welfare Associations have been formed which are taking care of day to day needs of the allottees of the respective projects.
- v. That the complainant, after checking the veracity of the project namely, 'ATS Tourmaline', Sector 109, Gurugram had applied for allotment of a residential unit and agreed to be bound by the terms and conditions of the documents executed by the parties to the complaint. It is submitted that based on the application of the complainant, unit no. 4061, Floor 6<sup>th</sup> Tower no. 4 was allotted to the complainant by the respondent.
- vi. That the Buyer's Agreement was executed on 20 09.2014. It is pertinent to mention herein that the Real Estate (Regulation and Development) Act, 2016 was not in force when the Agreement was entered into between the complainant and the respondent. The



provisions of the Real Estate (Regulation and Development) Act, 2016 thus cannot be enforced retrospectively. It is respectfully submitted that the complainants have consciously and voluntarily executed buyer's agreement dated 20<sup>th</sup> September 2014 after reading and understanding the terms and conditions incorporated therein to their full satisfaction. Once a contract is duly executed between the parties, then the entire rights and obligations of the parties thereto are wholly encapsulated in and determined by the said contract which remains binding on the parties thereto. The complaint preferred by the complainants is fallacious, unfounded and illusory.

- vii. That it is wrong that the total sale consideration of the unit was Rs. 1,42,68,750/-. It is not denied that the complainant was allotted unit No.4061 in tower no. 4. It is submitted that the complainant is well educated person who had made booking with the respondent out of his freewill and only after reading, understanding and verifying the terms and conditions stipulated in the documents pertaining to the allotment including the agreement. No objections against the terms of the documents including the agreement were raised by the complainant with the respondent. The complainant had made the booking only after reading, understanding and verifying the terms and conditions stipulated therein. The complainant had satisfied himself about the right, title, location and limitation in the project of the respondent and had accordingly applied vide application dated 27.08.2013. Moreover, the complainant had also inspected and had satisfied himself with the



facts, ownership records and documents relating to the title of the land, sanctioned building plans, permits/licenses/consents for constructions of the apartment and was fully satisfied in all respects. The complainant was aware and had confirmed to the respondent that he had entered into the agreement with full knowledge of all the laws, rules, regulations, notifications etc. and had clearly understood his rights, duties, responsibilities, obligations under each and all clauses of the agreement and had agreed to abide by the same. Thus, the averment of the complainant that he was induced to make the booking is absolutely incorrect and denied.

- viii. That it was agreed that as per Clause 4 of the Buyer's Agreement, the sale consideration of Rs. 1,42,68,750/- was exclusive of other costs, charges including but not limited to maintenance, stamp duty and registration charges, service tax, proportionate taxes and proportionate charges for provision of any other items/facilities. As per the same clause of the Buyer's Agreement, timely payment by the complainant of the Basic Sale price and other charges as stipulated in the Payment plan was to be the essence of the agreement.
- ix. That the possession of the unit was supposed to be offered to the complainant in accordance with the agreed terms and conditions of the Buyer's Agreement. The possession of the unit was subject to the occurrence of the force majeure events. That it is pertinent to mention herein that the implementation of the said project was hampered due to non-payment of instalments by allottees on time



and also due to the events and conditions which were beyond the control of the respondent and which have affected the materially affected the construction and progress of the project. Some of the Force Majeure events/conditions which were beyond the control of the respondent and affected the implementation of the project and are as under :

- Inability to undertake the construction for approx. 7-8 months due to Central Government's Notification with regard to Demonetization
  - Orders Passed by National Green Tribuna
  - Non-Payment of Instalments by Allottee
  - Inclement Weather Conditions viz. Gurugram:
- x. That the respondent after completing the construction of the unit in question, The Occupation Certificate on was granted by the concerned authorities on 09.08.2019. The respondent offered the possession of the unit to the complainant vide letter dated 09.08.2019. Copy of the offer of possession dated 09.08.2019 is attached with Complaint as Annexure C5 on Page No. 118. The complainant was intimated to remit the outstanding amount on the failure of which the delay penalty amount would accrue. The complainant was bound to take the physical possession of the unit after making payment towards the due amount along with interest and holding charges.
- xi. That the complainant is a real estate investor who has invested his money in the project of the respondent with an intention to make profit in a short span of time. However, his calculations have gone



wrong on account of slump in the real estate market and he is now deliberately trying to unnecessarily harass, pressurize and blackmail the respondent to submit to the unreasonable demands.

6. Copies of all the relevant documents have been filed and placed on the record. Their authenticity is not in dispute. Hence, the complaint can be decided on the basis of these undisputed documents and submission made by the parties.

**E. Jurisdiction of the authority**

7. 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**

8. As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by The Town and Country Planning Department, Haryana 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**



9. The authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter as per provisions of section 11(4)(a) of the Act leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

**F. Findings on the objections raised by the respondent:**

**F.1 Objection regarding complainants is in breach of the agreement for non-invocation of arbitration.**

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

*"Clause 21: All or any dispute that may arise with respect to the terms and conditions of this Agreement, including the interpretation and validity of the provisions hereof and the respective rights and obligations of the parties shall be first settled through mutual discussion and amicable settlement, failing which the same shall be settled through arbitration. The arbitration proceedings shall be under the Arbitration and Conciliation Act, 1996 and any statutory amendments/ modification thereto by a sole arbitrator who shall be mutually appointed by the Parties or if unable to be mutually appointed, then to be appointed by the Court. The decision of the Arbitrator shall be final and binding on the parties."*

11. The respondent contented that as per the terms and conditions of the agreement form 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 by the complainants, 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*, 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. Therefore, by applying same analogy the presence of arbitration clause could not be construed to take away the jurisdiction of the authority.

12. Further, in *Aftab Singh and ors. v. Emaar MGF Land Ltd and ors., Consumer case no. 701 of 2015 decided on 13.07.2017*, the National Consumer Disputes Redressal Commission, New Delhi (NCDRC) has held that the arbitration clause in agreement between the complainant and builder could not circumscribe the jurisdiction of a consumer. The relevant paras are reproduced below:



"49. Support to the above view is also lent by Section 79 of the recently enacted Real Estate (Regulation and Development) Act, 2016 (for short "the Real Estate Act") Section 79 of the said Act reads as follows: -

"79. Bar of jurisdiction - No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which the Authority or the adjudicating officer or the Appellate Tribunal is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act."

It can thus, be seen that the said provision expressly ousts the jurisdiction of the Civil Court in respect of any matter which the Real Estate Regulatory Authority, established under Sub-section (1) of Section 20 or the Adjudicating Officer, appointed under Sub-section (1) of Section 71 or the Real Estate Appellate Tribunal established under Section 43 of the Real Estate Act, is empowered to determine. Hence, in view of the binding dictum of the Hon'ble Supreme Court in A. Ayyaswamy (supra), the matters/disputes, which the Authorities under the Real Estate Act are empowered to decide, are non-arbitrable, notwithstanding an Arbitration Agreement between the parties to such matters, which, to a large extent, are similar to the disputes falling for resolution under the Consumer Act.

...  
56. Consequently, we unhesitatingly reject the arguments on behalf of the Builder and hold that an Arbitration Clause in the afore-stated kind of Agreements between the Complainant and the Builder cannot circumscribe the jurisdiction of a Consumer Fora, notwithstanding the amendments made to Section 8 of the Arbitration Act."

13. While considering the issue of maintainability of a complaint before a consumer forum/commission in the fact of an existing arbitration clause in the builder 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** has upheld the aforesaid judgement of NCDRC and as provided in Article 141 of the Constitution of India, the law declared by the Supreme Court shall be binding on all courts within the territory of India and accordingly, the authority is bound by the



aforesaid view. The relevant paras are of the judgement passed by the Supreme Court is reproduced below:

*"25. This Court in the series of judgments as noticed above considered the provisions of Consumer Protection Act, 1986 as well as Arbitration Act, 1996 and laid down that complaint under Consumer Protection Act being a special remedy, despite there being an arbitration agreement the proceedings before Consumer Forum have to go on and no error committed by Consumer Forum on rejecting the application. There is reason for not interjecting proceedings under Consumer Protection Act on the strength an arbitration agreement by Act, 1996. The remedy under Consumer Protection Act is a remedy provided to a consumer when there is a defect in any goods or services. The complaint means any allegation in writing made by a complainant has also been explained in Section 2(c) of the Act. The remedy under the Consumer Protection Act is confined to complaint by consumer as defined under the Act for defect or deficiencies caused by a service provider, the cheap and a quick remedy has been provided to the consumer which is the object and purpose of the Act as noticed above."*

14. Therefore, in view of the above judgments and considering the provision of the Act, the authority is of the view that complainants is well within the 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.

**G. Findings on the relief sought by the complainants:**

G. I Direct the respondent(s) to pay interest @ 10.75% per annum on the amount already paid by the complainant i.e., Rs. 1,49,72,563/- from 19.03.2018 till the actual handover of the physical possession.



15. The complainants alleged that although the unit was offered by the respondent on 09.08.2019 but the possession of the same was yet not handover to them. The unit is not complete even the basic amenities such as doors, windows, electric wiring, and sanitary items are not yet provided. The complainants paid amount raised at the time of the offer of possession was duly paid by the complainant on 30.08.2019 and despite several email updates, the respondent failed to handover the possession of the allotted unit and the same is evident from email dated 02.02.2022 sent by the respondent wherein admitting that the possession is yet to be handed over.
16. The respondent through its counsel stated at the bar that the occupation certificate had already been obtained on 09.08.2019 and subsequently, the offer of possession was also made on 09.08.2019.
17. To clear the position, the Executive Engineer/ Local Commission was appointed vide proceedings dated 20.04.2023 with a direct to visit the site and submit his report w.r.t status of subject unit w.r.t completion report of finishing work in terms of BBA. The report of LC has been filed on record and as per said report following submissions are made:-
- (A) *The furnishing works in the unit of complainant as per the agreed BBA is near about complete as the wardrobes, flooring, modular kitchen, plumbing and tiles in bathroom, split AC , electrical wiring, doors in the unit , window/UPVC work has been completed in the unit.*
- (B) *As per the commitment done by the respondent, they will give handover to the complainant by 17.05.2023 last.*



- (C) The balance work such as CP and chinaware fittings, fixtures in the kitchen, final coat of paint will be done always one day before of handover only.
- (D) As per the condition of the unit, it will take near about 4-5 days only to complete the balance work such as paint work and wooden flooring of 2 rooms, switch socket installation, CP and chinaware fittings, fixtures in the kitchen
18. The authority is of the considered view that a valid offer of possession must contain the following pre-requisites:-
- Possession must be offered after obtaining occupation certificate-
  - The subject unit should be in habitable condition
  - Possession should not be accompanied by unreasonable additional demands.
19. In view of the aforesaid circumstances, the authority directs the respondent to handover possession of the allotted unit complete in all aspects as per specifications of the buyers agreement within 2 weeks from the date of this order i.e. 04.10.2023. In the present complaint, the complainants intend to continue with the project and is 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."

20. Clause 6.2 of the buyer's agreement provides for the time period for handing over of possession and is reproduced below:

*The Developer endeavour to complete the construction of the apartment **within 42 months from the date of this agreement** (completion date). The company will send possession notice and offer possession of the Apartment to the applicant as and when the company receives the occupation certificate from the competent authority.*

21. **Admissibility of delay possession charges at prescribed rate of interest:** 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.*

22. The legislature in its wisdom in the subordinate legislation under the 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. **Admissibility of delay possession charges at prescribed rate of interest:** Proviso to section 18 provides that where an allottee does not intend to withdraw from the project, he shall be paid, by the promoter, interest for every month of delay, till the handing over of possession, at such rate as may be prescribed and it has been prescribed under rule 15 of the rules. Rule 15 has been reproduced as under:
- Rule 15. Prescribed rate of interest- [Proviso to section 12, section 18 and sub-section (4) and subsection (7) of section 19]**
- (2) 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.
24. The legislature in its wisdom in the subordinate legislation under 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.
25. 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., 04.10.2023 is 8.75%. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.75%.
26. **Rate of interest to be paid by the complainants in case of delay in making payments-** The definition of term 'interest' as defined under section 2(z) 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;"*

27. 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 the complainants in case of delayed possession charges.
28. However, in the present matter, the respondent has already offered the possession of the allotted unit on 09.08.2019 after obtaining OC. However, despite several reminders and follow-ups by the complainants, the respondent has failed to handover the possession of the allotted unit. Now the issue arises before the authority is that up to which date, the delay possession charges be allowed to the complainants as despite offer of possession dated 09.08.2019 after obtaining OC, the possession of the subject unit is yet to be handed over to them. The authority observes that the complainants have already paid an amount of Rs. 1,49,72,563/- which is more than the total sale consideration of Rs. 1,42,68,750/- whereas the respondent stands firm



at its submission and documents submitted by it that the offer of the subject unit has already been made. The authority is of considered view that as per section 11(4)(b) of Act, 2016 the OC is received the respondent would be obliged to supply a copy of same to the complaints individually or association of allottees, as the case may be. On the other hand, as per Section 19(10) of the Act obligates the allottee to take possession of the subject unit within 2 months from the date of receipt of occupation certificate. In the present complaint, the occupation certificate was granted by the competent authority on 09.08.2019. However, the respondent offered the possession of the unit in question to the complainant only on 09.08.2019. So, it can be said that the complainant came to know about the occupation certificate only upon the date of offer of possession.

29. Therefore, the complainants have failed to fulfil the obligation conferred upon them vide section 19 (10) of the Act 2016. However, it was submitted by the complainants that despite several follow ups, the respondent still failed to handover the possession of the allotted unit and the unit is still not complete as per specifications mentioned in the buyer, s agreement.
30. On considering the above-mentioned facts, the submissions made by both the parties it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with section 18(1) of the Act on the part of the respondent is established. By





virtue of clause 6.2 of the flat buyer's agreement executed between the parties on 20.09.2014, possession of the booked unit was to be delivered within a period of 42 months from the date of execution of the agreement which comes out to be 20.03.2018.

31. The respondent-builder is directed to handover the possession of the allotted unit complete in all aspects as per specification of buyer's agreement within 2 weeks from date this order i.e. 04.10.2023 and to submit a compliance report in this regard failing which it shall be presumed there was deliberate attempt on part of the respondent for not handing over the possession of the allotted unit. Failing which non-compliance of the mandate contained in section 11 (4)(a) of the Act on the part of the respondent shall be established and accordingly, the complainants shall be entitled for delayed possession charges @10.75% p.a. w.e.f from due date of possession i.e., 20.03.2018 till actual handing over of possession as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

#### **H. Directions of the authority**

32. 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 promoter as per the function entrusted to the authority under section 34(f):
- i. The respondent is directed to handover the possession of the allotted unit to the complainants complete in all aspects as per specifications of buyers agreement within 2 weeks from date of this order i.e. 04.10.2023, failing which non-compliance of mandated contained in section 11(4)(a) of the



Act on the part of the respondent shall be established and accordingly, the complainants shall be entitled to delay possession charges @ 10.75% per annum w.e.f. from due date of possession i.e., 20.03.2018 till actual handing over of possession as per section 18(1) of the Act of 2016 read with rule 15 of the rules.

- ii. The respondent is directed to pay arrears of interest accrued within 90 days from the date of order and thereafter monthly payment of interest be paid till date of handing over of possession shall be paid on or before the 10<sup>th</sup> of each succeeding month.
  - 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., 10.75% 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.
  - iv. The respondent shall not charge anything from the complainants which is not part of the buyer's agreement.
33. Complaint stands disposed of.
34. File be consigned to the registry.

**Ashok Sangwan**  
**Member**

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 04.10.2023