BEFORE THE HARYANA REAL ESTATE REGULATORY AUTHORITY, GURUGRAM

Complaint no. :	**4732/2022**
Date of filing complaint:	**05.07.2022**
First date of hearing:	**07.09.2022**
Date of decision	**26.09.2023**

1. 2.	Gopal Krishan Arora Sunita Arora R/O: H No C 1/17 First Floor Rana Pratap Bagh Malka Ganj Delhi	**Complainants**
	Versus	
	Experion Developers Private Limited R/O: F-9, First Floor, Manish Plaza-I, Plot No. 7 Mlu, Sector 10, Dwarka, New Delhi-110075	**Respondent**

CORAM:	
Shri Vijay Kumar Goyal	**Member**
Shri Ashok Sangwan	**Member**
Shri Sanjeev Kumar Arora	**Member**
APPEARANCE:	
Sh. Sukhbir Yadav (Advocate)	Complainants
Sh. Venket Rao (Advocate)	Respondent

ORDER

1. The present complaint has been filed by the complainant/allottees under Section 31 of the Real Estate (Regulation and Development) Act, 2016(in short, the Act) read with rule 29 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all obligations, responsibilities and functions under the 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 complainants, date of proposed handing over the possession and delay period, if any, have been detailed in the following tabular form:

S.No.	Heads	Information
1.	Name of the project	Wind chants Sector 112, Chauma, Gurugram
2.	Nature	Group housing
3.	DTCP License	21 of 2008 dated 08.02.2008 valid up to 07.02.2020 28 of 2012 dated 07.04.2012 valid up to 06.04.2025
4.	Licensee name	Experion Developers
5.	Endorsed	20.05.2013 (Page 101 of complaint)
6.	Unit no.	WT -07/1002 (Page 57 of complaint vide allotment letter which was in the name of the previous allottee)
7.	Unit area admeasuring	2650 sq. ft. Increased to 2802 sq. ft. by 152. Sq. ft (Page 57 of complaint vide allotment letter which was in the name of the previous allottee)
8.	Date of allotment letter	14.05.2013

		(As per annexure 2 on page 57 of the complaint in favor of the previous allottee namely Rajesh Kumar)
9.	Date of environment clearance	27.12.2012 (As per project details taken from the planning branch)
10.	Date of BBA	26.12.2012
11.	Possession clause	10 Project completion period 10.1 Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of **42 (forty two months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later** ("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities. However, in case of any default under this Agreement that is not rectified or remedied by the buyer within the period as may be stipulated, the Company shall

		not be bound by such Commitment Period.
12.	Due date of possession	24.12.2016 (Calculated from the date of environment clearance being later i.e 27.12.2022 and grace period of 180 days being allowed)
13.	Total sale consideration	Rs. 2,10,95,530/- (As alleged by the complainant)
14.	Amount paid by the complainant	Rs. 2,14,02,772/- (As alleged by the complainant)
15.	Occupation certificate	06.12.2017 (Page 98 and 99 of the reply)
16.	Notice of possession	08.12.2017 (Page 133 of complaint)

B. Facts of the complaint:

3. That on the basis of representation and assurance of office bearers of respondent, the complainants booked a unit, claimed to be having a sale area of 2650 sq. ft. bearing unit no. WT-07/1002 in the project of the respondent. The said unit was originally allotted to Mr. Rajesh Kumar and Mr. Surjeet Yadav on payment of Rs. 11,00,000 as booking amount vide cheque No. 675774 drawn on Union Bank of India. A provisional allotment letter dated 11.05.2013 was issued by the respondent which specified the total sale price of Rs. 2,04,74,150/-

4. Thereafter on 26.12.2012, the buyer's agreement was executed inter-se the respondent and the original allottee. According to

clause 10.1 of the buyer's agreement, the respondent had promised to give possession of the said unit within 42 months from the date of approval of the building plans or the date of receipt of the approval of the Ministry of Environment and Forest, Government of India for the project or execution of this agreement. It is pertinent to mention here that the respondent commenced the construction of the project on 16.01.2013, therefore, it is presumed that the respondent commenced the construction after receipt of all necessary approvals, moreover at the time of execution of the BBA, the respondent represented that they have all necessary approvals for the commencement of the construction, therefore, the due date of possession was 26.06.2016. It is highly pertinent to mention here that the sale area of the unit was claimed to be 2650 sq. ft., but later on, the respondent, for the first time on 28.04.2017, started claiming that the sale area of the apartment has increased from 2650 sq. ft. to 2802 sq. ft. As per BBA, the total cost of the unit was Rs. 2,10,95,530/-

5. That on 20.05.2013, the allotment of the said unit was endorsed in favour of Mr. Gopal Krishan Arora and Mrs. Sunita Arora, with the permission and approval of the respondent. The respondent endorsed the name of Mr. Gopal Krishan Arora and Mrs. Sunita Arora in its record and on Schedule – VII of the buyer's agreement as a subsequent allottee.

6. Thereafter, the complainants kept paying the demands as and when raised by the respondent, without a single default, and till date has paid more than 100% of the total sale consideration i.e. Rs. 2,14,02,772/- till 08.01.2018. It is pertinent to mention here that

this amount does not include some of the TDS payments which complainants have deposited but the respondent has failed to give credit for same despite repeated requests

7. That since July 2016 the complainants are regularly visiting the office of the respondent as well as the construction site and made efforts to get the possession of the allotted unit, but all in vain, despite several visits by the complainants. On 28.04.2017 the respondent sent an e-mail to the complainant and informed them that "with the project reaching the handover stage we have got clarity on the overall area and the subsequent impact on your respective unit. As per the said calculations, the sale area of your apartment has increased by 152 sq. ft. and the revised area of your unit according is 2802 sq. ft It is pertinent to note that before 28.04.2017 there was not a whisper of any alleged increase in sale area, nor any consent was ever taken from the complainants before allegedly increasing the sale area. No calculation, as claimed in the letter dated 28.04.2017, was ever shared with complainants. Thereafter, the complainants immediately raised a strict objection and sent a grievance e-mail on 29.04.2017 stating that "We are unable to understand as to how the area can be increased by such a huge number. Requesting you to provide the basics of calculations and also details of the carpet area, plinth area, and usable area of the apartment".

8. That 22.06.2017 the respondent sent an email claiming an amount of Rs. 1,09,267/- towards the Haryana Value Added Tax discharged under the Haryana Alternative Tax compliance scheme for contractors, 2016. It is pertinent to mention here that the liability

of HVAT was discharged by respondent under a composition and amnesty scheme and as such this liability could not be passed on to homebuyers including complainants. On 29.09.2017 the respondent sent a demand of Rs. 12,00,470/- on account of the alleged increase in the sale area of the flat. It is pertinent to mention here that due to the alleged increase in sale area, the total cost of the flat has increased to Rs. 2,25,92,105/- No calculation or justification was shared with the Complainants despite repeated requests.

9. That the complainants sent several grievance emails to the respondent and specifically asked for details about the area of the unit, the contents of the email dated 09.11.2017. After a long delay, on 08.12.2017, the respondent sent a letter for notice for possession with increased area and raised a demand of Rs. 25,31,277/- against the sale consideration of the unit along with Rs. 2,30,123/- towards advance maintenance and Rs. 12,39,600/- towards stamp duty, registration, and legal fees. It is pertinent to mention here that due to the alleged increase in the area of the unit, the cost of the unit gets increased and consequently increases in EDC/IDC, IFMS, maintenance, stamp duty charges, etc. It is also pertinent to mention here that the said notice of possession was conditional and also contained multiple illegal demands outside the terms of ABA and therefore the same is liable to be quashed. After receiving the notice of possession, the complainants visited the project site on 03.01.2018 and were shocked to see that the place was not in habitable condition as heavy construction work was still ongoing in residential towers, 24 Mtr approach road, and internal roads were not ready, boundary wall was incomplete, skywalk and

club house were not operational. It is pertinent to mention here that the complainants were not allowed the inspection of their specific unit.

10. That on the date of the site visit painting work was going on, there were no boundary walls, hence there were no security arrangements, and the club was not operational, and construction debris was laying here and there, internal infrastructure was incomplete. It is further pertinent to mention here that the respondent had constructed a high-speed diesel tank and GAS bank in front of the tower of the complainants. These structures were built illegally in violation of sanctioned plans. contain highly inflammable materials like diesel and cooking gas. These structures put the life and property of residents of complainants tower at grave risk.

11. That the complainants observed many other irregularities which they brought to the attention of the CRM head during the in-person meeting on 03.01.2018. The complainants shared photographs of the inhabitable status of the project and also sent a mail to the respondent. It is pertinent to mention here that occupation certificate for Tower T-7 was granted by the concerned department on 24.12.2018, therefore, the offer of possession dated 08.12.2017 is null and void, being bad in law as the said notice was issued when the project was not ready for habitation. Further the respondent did not share the OC for the relevant tower along with the notice of possession. After repeated requests, the respondent shared an OC dated 06.12.2017 which did not pertain to Tower no. 7 of the respondent. The OC of tower T-7 was issued by the competent

Authority on 24.12.2018. It is further pertinent to mention here that believing in the words of the respondent the complainants, being a law-abiding and compliant party, paid Rs. 13,63,775/- without prejudice under protest.

12. That on 07.01.2018, the complainants again send a grievance email to the respondent and asked for the area calculation and justification for an increase in the area of the unit. In January the complainants visited the project site and shocked to see that the construction work was still ongoing on many towers. On repeated requests of the complainants, the respondent shared an architect certificate on 03.02.2018. The architect certificate failed to provide the detailed calculation of the flat(s) and detailed carpet area calculation of the actual site. It is highly pertinent to mention here that the respondent failed to explain the reason behind the increase in area of carpet area and super area, moreover, the carpet area of the unit of complainants. It did not contain the details of common areas and the basis on which common areas were distributed among all dwelling units. Thereafter, several emails were exchanged between the parties wherein complainants repeatedly requested to share details/ justification and to handover possession.

13. That the complainants sent more than 16 emails to respondent, but the respondent never provided a detailed calculation of the actual area of said unit and the comparative table of areas of each component as per original drawings, revised drawings, and drawings. On 30.07.2020 the respondent sent a demand email with a demand letter and asked for the payment of Rs. 17,20,756/- with

an interest of Rs. 5,98,236/-. The complainants reiterated his request to share details of area, withdraw illegal demands and handover possession of unit complete in all respects. On 14.03.2021, the respondent issued a public notice inviting objections to proposed revision of building plans. It is at that time, that the complainants came to know the respondent had illegally built 20 additional EWS units, had illegally constructed high speed diesel tank and gas bank by encroaching on the organised green area adjacent to the tower of complainants' unit. On 09.04.2021, the complainants raised objections against the proposed revision of approved building plans in terms of the public notice dated 14.03.2021. On 12.08.2021, the complainants sent a grievance email to the respondent alleging deficiency in providing area calculation and documents and illegal construction of additional EWS units, etc.

14. That the main grievance of the complainants in the present complaint is that in spite of the complainants having paid more than 100% of the actual purchase consideration of the unit as per the agreement the respondent has failed to deliver possession of the fully constructed and developed unit as per approved sanctioned plans and in terms of BBA and Brochure, moreover, the respondent raised multiple illegal demands outside the terms of ABA, charged several amounts by invoking arbitrary and one sided clauses in ABA, and failed to provide the detailed area calculation of the flat. Further, the Notice of Possession dated 08.12.2017 was bad in law as the place was not habitable. The said offer contained unfair conditions like payment for alleged additional area along with multiple demands outside the terms of ABA.

C. Relief sought by the complainants:

15. The complainants have sought the following relief(s):

i. Direct the respondent – builder to give possession and to pay delay possession charges to the complainants.

ii. Direct the respondent to provide details of all common areas along with calculation of each apartment area and basis of proportionate allocation of all common areas along with a comparative chart of all components of Sale Area as per original building plans, revised sanctioned plans and finally achieved areas as per as-built Drawings and originally approved building plans.

iii. Direct the respondent to quash the illegal demands by the respondent of an alleged increase in sale area and direct the respondent to refund the excess amount charges on account of overstating the sale area.

iv.Direct the respondent by restraining them from charging holding charges, maintenance charges, gst , community building furnishing charges and interest free maintenance charges .

v. Direct the respondent to restrain them from charging adhoc charges, car parking user charges and refund hvat .

vi.Direct the respondent to refund excess amount collected on account of EDC and IDC.

D. Reply by respondent:

The answering respondent by way of written reply made the following submissions

16. That the unit bearing No. WT/07/1002 admeasuring approximately 2650 sq. ft. sale area in the project of the respondent "Windchants" was originally allotted to Mr. Rajesh Kumar and Mr. Surjeet Yadav vide provisional allotment letter. The original allottees executed the buyer's agreement for the said unit after carefully reading and understanding the terms and conditions contained therein on 26.12.2012. That the said unit was thereafter transferred to the complainants pursuant to application for transfer of allotment by the original allottees by way of endorsement from the original allottees on 20.05.2013.

17. That it is pertinent to mention herein that as per clause 10.1 of the ABA dated 26.12.2012, the possession of the unit was to be handed over within a period of 42 months + 180 days grace period from the date of approval of building plans or date of receipt of the approval of the Ministry of Environment and Forests, Government of India for the instant project or execution of the ABA, whichever is later, which was subject to force majeure situations. Thus, the unit was to be delivered to the Complainants on or before 20.05.2017. The Competent Authority granted the Occupation Certificate only on 06.12. 2017. It is clarified that the nomenclature for the Tower WT-07 is used for the purposes of marketing and for general usage. However, the nomenclature for the same tower as per the sanctioned plan and occupation certificate is T-01.

18. That upon receipt of the occupation certificate, the respondent sent the notice of possession letter dated 08.12.2017 requesting the complainants to pay off their dues, take possession of their unit and complete documentation for the execution of the conveyance deed.

However, it is pertinent to mention that despite receiving the notice of possession letter dated 08.12.2017, reminder for possession dated 28.02.2018 and final notice dated 26.09.2019, the complainants never came forward to make the due payments as per the ABA, take possession of the unit nor have completed the requisite formalities to execute the conveyance deed. That since the complainants have not taken physical possession of the unit, the respondent is left with no other option but to maintain the unit of the complainants till the handing over of possession to them.

19. That the unit was endorsed in favour of the complainants on 20.05.2013. Therefore, the rights of the complainants over the unit only persisted from 20.05.2013 and therefore, the due date of handing over of possession is 42 months from the date of endorsement of allotment in favour of the complainants. Further, a grace period of 180 days after expiry of the due date is to be taken into consideration for unforeseen and unplanned project realities. Thus, the project was to be handed over by 20.05.2017 subject to force majeure and timely payment by the complainants. The respondent being a responsible developer and abiding by the terms and conditions recorded in the ABA, has already paid an amount of Rs. 1,98,942/- to the complainants on account of compensation towards the delay in handing over possession. It is noteworthy that the said compensation was paid by the respondent of its own free will and reflects in the ledger as entry dated 07.12.2017.

20. That it is relevant to mention herein that the Government of Haryana has floated the Amnesty Scheme namely the Haryana Alternative Tax Compliance Scheme for Contractors, 2016. That the

respondent availing the benefit of the said scheme has discharged the VAT liability of Rs. 98,391/- on the amount collected from the complainants during the financial year 2012-2013 and 2013-2014 at the rate of 1.05%.

21. That VAT being a statutory levy is required to be paid by the complainants as agreed under the terms and conditions of the ABA. Therefore, the complainants are bound to reimburse the respondent the amount paid off by as VAT by the respondent on behalf of the complainants. That the respondent duly informed the complainants vide letter dated 22.06.2017 that VAT has been paid on behalf of them and vide the same letter the respondent requested the complainants to reimburse the respondent the amount already deposited towards VAT.

22. That the government notified the Goods and Services Act 2017, as per which the GST was made mandatory to be charged. Accordingly, in Clause 4.3 of the ABA, it was clearly provided that the allottee will be responsible and liable to bear the 'present/future applicable taxes/levies/duties/cesses' as may be imposed by the concerned authorities from time to time. On account of Anti profiteering benefit under GST pursuant to Section 171 of Central Goods and Services Tax Act, 2017 the input tax credit was to be passed on to the recipients. Accordingly, vide letter dated 01.05.2019 the respondent informed the complainants that credit of GST benefit under section 171 of Central Goods and Services Tax Act, 2017 is being passed on and vide credit note dated 26.04.2019 an amount of Rs.61,227/- was credited to the account of the complainants against the purchase of unit no.WT-07/1002 in

project Wind chants and the same was duly acknowledged by the complainants.

23. That the original sale area of the said unit, as per the ABA was 2650 sq.ft. However, on completion of the project and final calculation of the area of the unit, the sale area was increased to 2802 sq.ft. (addition of 152 sq.ft.). It is most humbly submitted that the permissible limit in variation of the Sale Area as per the ABA was 10%. However, the variation in the sale area of the unit of the complainant is merely 5.7%.

24. That when the relevant phase of the project was near completion, the respondent measured the area of the unit. The respondent adhering to the terms and conditions recorded in the ABA and as agreed between the parties, under clause 8.6, the respondent informed the complainants in writing about the change in sale area vide Letter dated 27.04.2017 and email dated 28.04.2017. The complainants duly received and acknowledged the letter dated 27.04.2017 and email dated 28.04.2017 and in response to the same the complainants sent an email dated 29.04.2017 requesting the respondent to provide justification for the increase in area. It is pertinent to mention that the respondent in order to prove the genuineness and justification for the increase in the total sale area of the unit, appointed an independent Architect to measure and certify the areas of the unit as per terms of Clause 3.1 of the ABA.

25. That the respondent again appointed Knight Frank India Pvt. Ltd. to provide their report/ opinion on the total super built-up area of the project. This was done in order to clarify that the changes in total sale area were within the parameter as agreed in the ABA.

Additionally, independent measurement and verification of the build-up area of the apartments and common areas of the project were also again done by the D Idea Architects. The respondent in order to provide individual justification for the increase in the area of the unit of the complainants is also attaching an affidavit by the Senior General Manager, Design & Architecture of the respondent company. The detailed comparison table showing the comparison of the old area and loading of the said Apartment and revised area and loading after construction of the said Apartment is provided in the said Affidavit.

26. Community Building Furnishing Charges (CBFC) & Interest-Free Maintenance Security Deposit (IFMSD): It is pertinent to mention herein that the complainants in Schedule V of the ABA has specifically agreed to pay the CBFC and IFMSD charges. Therefore, the complainants are liable to pay the said charges. Car Parking Usage Charges: The complainants in clause 3.4 of the ABA have specifically agreed to pay for the car parking usage charges. The said car parking usage charges are also mentioned in the payment schedule attached as schedule V in the ABA. Therefore, the complainants are liable to pay the car parking usage charges. That as per the ABA so signed and acknowledged by the complainants, it was well within the knowledge of the complainants that they are liable to pay for maintenance charges on offer of possession and on account of delay in execution of the conveyance deed.

27. That the respondent on the basis of feedback from its allottees and the recommendation of the design and architecture team, the respondent proposed to provide additional facilities to its allottees

i.e., fitting of geysers and a piped gas line from the central gas bank that would be created within the complex of the project for the benefit of the allottees. The complainants duly sent an email dated 09.06.2015 appreciating the initiative of the respondent. Further, vide the said email he stated that installation of Gas Tank and High Speed Diesel Tank is a good idea and they never objected to the construction of the same. The complainants only raised a limited objection which was solely in respect of the cost estimate provided by the respondent. Moreover, it is pertinent to mention herein that the gas bank has been provided by the respondent as only a temporary arrangement for the supply of gas until piped gas is made available in the area.

28. All other averments made in the complaint were denied in toto.

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

E. Jurisdiction of the authority:

30. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

As per notification no. 1/92/2017-1TCP dated 14.12.2017 issued by Town and Country Planning Department, the jurisdiction of Real Estate Regulatory Authority, Gurugram shall be entire Gurugram District for all purpose with offices situated in

Gurugram. In the present case, the project in question is situated within the planning area of Gurugram district. Therefore, this authority has complete territorial jurisdiction to deal with the present complaint.

E. II Subject matter jurisdiction

31. 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) The promoter shall-*
>
> *(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:***
>
> *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.*

32. 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 relief sought by the complainants:

F.I Direct the respondent – builder to give possession and to pay delay possession charges to the complainants.

33. In the present case in hand the complainants are subsequent allottee. The said unit was transferred in the favour of the complainants on 20.05.2013 i.e., before the due date of handing over of the possession (24.12.2016) of the allotted unit. As decided in complainant no. 4037 of 2019 titled as Varun Gupta Vs. Emaar MGF Land Limited, the authority is of the considered view that in cases where the subsequent allottee had stepped into the shoes of original allottee before the due date of handing over of possession, the delayed possession charges shall be granted w.e,f. due date of handing over possession.

34. 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."*

35. Clause 10 of the buyer's agreement 26.12.2012 provides for handing over of possession and is reproduced below:

> 10 Project completion period
>
> *10.1 Subject to Force Majeure, timely payment of the Total Sale Consideration and other provisions of this Agreement, based upon the Company's estimates as per present Project plans, the Company intends to hand over possession of the Apartment within a period of 42 (forty two*

months from the date of approval of the Building Plans or the date of receipt of the approval of the Ministry of Environment and forests, Government of India for the Project or execution of this Agreement, whichever is later ("Commitment Period"). The Buyer further agrees that the Company shall additionally be entitled to a time of 180 (one hundred and eighty days ("Grace Period") after expiry of the Commitment Period for unforeseen and unplanned Project realities.

36. The Authority has gone through the possession clause of the agreement and observes that the respondent-developer proposes to handover the possession of the allotted unit within a period of 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later . In the present case, the flat buyer's agreement inter-se parties was executed on 26.12.2012 plus grace period of 180 days as such the due date of handing over of possession comes out to be 24.12.2016.

37. **Admissibility of grace period:** As per clause 10.1 of buyer's agreement dated 26.12.2012, the respondent-promoter proposed to handover the possession of the said unit within a period of period of 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later . Therefore, as per clause 10.1 of the buyer's agreement dated 26.12.2012, the due date of possession comes out to be 24.12.2016 by allowing grace period being unqualified and being allowed in earlier case no. 530 of 2018.

38. **Admissibility of delay possession charges at prescribed rate of interest:** The complainant are seeking delay possession charges

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

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

39. 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.

40. 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., 26.09.2023 is @ 8.75 %. Accordingly, the prescribed rate of interest will be marginal cost of lending rate +2% i.e., 10.70%.

41. 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;"*

42. Therefore, interest on the delay payments from the complainant shall be charged at the prescribed rate i.e., 10.75 % by the respondent/promoters which is the same as is being granted to them in case of delayed possession charges.

43. On consideration of the documents available on record and submissions made regarding contravention of provisions of the Act, the Authority is satisfied that the respondent is in contravention of the section 11(4)(a) of the Act by not handing over possession by the due date as per the agreement. By virtue of clause 10.01 of buyer's agreement executed between the parties on 26.12.2012, the possession of the subject apartment was to be delivered within a period of period of 42 months from the date of approval of building plans or the date of receipt of approval of environment clearance or execution of this agreement whichever is later. The due date of possession is calculated from the date of environment clearance plus 180 days grace period which comes out to be

24.12.2016. The respondent has offered the possession of the allotted unit on 08.12.2017 after obtaining occupation certificate from competent Authority on 06.12.2017.

44. 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 has been obtained from the competent Authority on 06.12.2017 and it has also offered the possession of the allotted unit on 08.12.2017. Therefore, in the interest of natural justice, the complainant should be given 2 months' time from the date of offer of possession. This 2 months' of reasonable time is to be given to the complainant keeping in mind that even after intimation of possession practically he has to arrange a lot of logistics and requisite documents including but not limited to inspection of the completely finished unit but this is subject to that the unit being handed over at the time of taking possession is in habitable condition. It is further clarified that the delay possession charges shall be payable from the due date of possession i.e. 24.12.2016 till offer of possession i.e 08.12.2017. The respondent-builder has already offered the possession of the allotted unit on 08.12.2017, thus delay possession charges shall be payable till offer of possession plus two months i.e. 08.02.2018.

45. Accordingly, it is the failure of the promoter to fulfil its obligations and responsibilities as per the buyer's agreement dated 26.12.2012 to hand over the possession within the stipulated period. Accordingly, the non-compliance of the mandate contained in section 11(4)(a) read with proviso to section 18(1) of the Act on

the part of the respondent is established. As such, the allottee shall be paid, by the promoter, interest for every month of delay from due date of possession i.e., 24.12.2016 till offer of possession plus two months i.e. 08.02.2018; at the prescribed rate i.e., 10.75 % p.a. as per proviso to section 18(1) of the Act read with rule 15 of the rules.

46. The respondent stated that a compensation/penalty on account of delay has already been credited to the account of complainant. The Authority observes that as per reply, an amount of Rs.1,98,942/- has been credited to the account of complainant as delay possession charges. Therefore, out of amount so assessed on account of delay possession charges, the respondent is entitled to deduct the amount already paid towards DPC.

F.II Direct the respondent to provide details of all common areas along with calculation of each apartment area and basis of proportionate allocation of all common areas along with a comparative chart of all components of Sale Area as per original building plans, revised sanctioned plans and finally achieved areas as per as-built Drawings and originally approved Building Plans

47. According to section 19(1) of the Act of 2016 The allottee shall be entitled to obtain the information relating to sanctioned plans, layout plans along with the specifications, approved by the competent authority and such other information as provided in this Act or the rules and regulations made thereunder or the agreement for sale signed with the promoter.

F.III Direct the respondent to quash the illegal demands by the respondent of an alleged increase in sale area and direct the

respondent to refund the excess amount charges on account of overstating the sale area.

48. As per letter dated 28.04.2017 on page no. 110 of complaint, the respondent has increased the super area of the flat from 2650 sq. ft. to 2802 sq. ft. without any prior intimation and justification. Whereas at page no. 123 of reply a letter dated 27.04.2017 regarding finalization of area w.r.t. allotted unit. The respondent has increased the super area by 152 sq. ft. In other word, the area of the said unit was increased by 5.7%. As per clause 8.6 of buyer's agreement, the area of the said unit can be said to be increased by 10%. The relevant clause of the agreement is reproduced hereunder: -

> *While every attempt shall be made to adhere to the Sale Area, in case any Changes result in any revision in the Sale Area, the Company shall advise the Buyer in writing along with the commensurate increase/decrease in Total Sale Consideration based, however, upon the BSP as agreed herein. Subject otherwise to the terms and conditions of this Agreement, a maximum of 10% variation in the Sale Area and the commensurate variation in the Total Sale Consideration is agreed to be acceptable to the Buyer and the Buyer undertakes to be bound by such increase / decrease in the Sale Area and the commensurate increase /decrease in the Total Sale Consideration. For any increase/decrease in the Sale Area, the payment for the same shall be required to be adjusted at the time of Notice of Possession or immediately in case of any Transfer of the Apartment before the Notice of Possession or as otherwise advised by the Company.*

49. The respondent submitted that as per clause 8.6 of buyer's agreement he is entitled to charge for such increase which is less than 10%. The complainant submitted that in ***NCDRC consumer case no. 285 of 2018 titled as Pawan Gupta Vs Experion Developers Private Limited***, it was held that the respondent is not entitled to change any amount on account of increase in area. The relevant part of the order has been reproduced hereunder: -

The complaints have been filed mainly for two reasons. The first is that the opposite party has demanded extra money for excess area and second is the delay in handing over the possession. In respect of excess area, the complainant has made a point that without any basis the opposite party sent the demand for excess area and the certificate of the architect was sent to the complainant, which of a later date. The justification given by the party that on the basis of the internal report of the architect the demand was made for excess area is not acceptable because no such report or any other document has been filed by the opposite party to prove the excess area. Once the original plan is approved by the competent authority, the areas of residential unit as well as of the common spaces and common buildings are specified and super area cannot change until there is change in either the area of the flat or in the area of any of the common buildings or the total area of the project (plot area) is changed. The real test for excess area would be that the opposite party should provide a comparison of the areas of the original approved common spaces and the flats with finally approved common spaces/buildings and the flats. This has not been done. In fact, this is a common practice adopted by majority of builders/developers which is basically an unfair trade practice. This has become a means to extract extra money from the allottees at the time when allottee cannot leave the project as his substantial amount is locked in the project and he is about to take possession. There is no prevailing system when the competent authority which approves the plan issues some kind of certificate in respect of the extra super area at the final stage. There is no harm in communicating and charging for the extra area at the final stage but for the sake of transparency the must share the actual reason for increase in the super area based on the comparison of the originally approved buildings and finally approved buildings. Basically, the idea is that the opposite party allottee must know the change in the finally approved lay-out and areas of common spaces and the originally approved lay-out and areas. In my view, until this is done, the opposite party is not entitled to payment of any excess area. Though the Real Estate Regulation Act (RERA) 2016 has made it compulsory for the builders/developers to indicate the carpet area of the flat, however the, problem of super area is not yet fully solved and further reforms are required.

50. The authority is of considered view that the said approval of increase in area up to 10% is subject to the conditions that the flats and other components of the super area on the project have been constructed in accordance with the plans approved by the competent authorities. Moreover, in the present case also, the respondent has increased the super area of the flat from 2650 sq. ft. to 2802 sq. ft. without any prior intimation and justification. Whereas on page no. 123 of reply a letter dated 27.04.2017 regarding finalization of area w.r.t. allotted unit was annexed. On repeated requests of the complainants, the respondent shared an architect certificate on 03.02.2018.But it is pertinent to mention herein that the said architect certificate is of 03.02.2018 i.e. after 27.04.2017, when such increase of area has been intimated to the complainant. In other word, the area of the said unit is increased by 5.7%. The respondent is entitled to charge for the same at the agreed rates being less than 10% as was agreed between both the parties.

F.IV Direct the respondent by restraining them from charging holding charges, maintenance charges, gst , community building furnishing charges and interest free maintenance charges .

51. **Holding charges** - The developer shall not be entitled to any holding charges though it would be entitled to interest for the period the payment is delayed. Also, holding charges shall also not be charged by the promoter at any point of time even after being part of agreement as per law settled by the Hon'ble Supreme Court in civil appeal no. 3864-3889/2020 dated 14.12. 2020.However the reasonable maintenance charges are required to be paid altogether.

52. **Maintenance Charges** - The Act mandates under section 11 (4) (d) that the developer will be responsible for providing and maintaining the essential services, on reasonable charges, till the taking over of the maintenance of the project by the association of the allottees. Clause 15.5, 15.6 & 15.7 of the buyer agreement provides the clause for maintenance charges.

53. In the present case, the respondent has demanded charges towards maintenance of Rs. 25,31,277/- through demand cum notice of possession letter dated 08.12.2017 on page no. 135 of the complaint. However, the respondent shall not demand the advance maintenance charges for more than one (1) year from the allottee even in those cases wherein no specific clause has been prescribed in the agreement or where the AMC has been demanded for more than one (1) year.

54. **GST** - In the instant complainant, the respondent charged amount on pretext of GST from the complainants. However, it has been submitted by the respondent that it has already refunded an amount of Rs. 61,227/- to the complainants for which they charged on account of GST.

55. The Authority laid reliance on judgement dated 04.09.2018 in ***complaint no. 49/2018, titled as Parkash Chand Arohi Vs. M/s Pivotal Infrastructure Pvt. Ltd.*** passed by the Haryana Real Estate Regulatory Authority, Panchkula wherein it has been observed that where the possession of the flat in term of buyer's agreement was required to be delivered on 1.10.2013 and the incidence of GST came into operation thereafter on 01.07.2017. So, the complainant cannot be burdened to discharge a liability which had accrued

solely due to respondent's own fault in delivering timely possession of the flat. The aforesaid order was upheld by Hon'ble Haryana Real Estate Appellate Tribunal, Chandigarh in ***appeal no. 21 of 2019***. The relevant para is reproduced below:

> *"93. This fact is not disputed that the GST has become applicable w.e.f. 01.07.2017. As per the first Flat Buyer's Agreement dated 14.02.2011, the deemed date of possession comes to 13.08.2014 and as per the second agreement dated 29.03.2013 the deemed date of possession comes to 28.09.2016. So, taking the deemed date of possession of both the agreements, GST has not become applicable by that date. No doubt, in Clauses 4.12 and 5.1.2 the respondent/allottee has agreed to pay all the Government rates, tax on land, municipal property taxes and other taxes levied or leviable now or in future by Government, municipal authority or any other government authority. But this liability shall be confined only up to the deemed date of possession. The delay in delivery of possession is the default on the part of the appellant/promoter and the possession was offered on 08.12.2017 by that time the GST had become applicable. But it is settled principle of law that a person cannot take the benefit of his own wrong/default. So, the appellant/promoter was not entitled to charge GST from the respondent/allottee as the liability of GST had not become due up to the deemed date of possession of both the agreements."*

56. In the instant complainant, the due date of possession comes out to be 24.12.2016 which is prior to the date of coming into force of GST i.e. 01.07.2017. In view of the above, the Authority is of the view that the respondent/promoter is not entitled to charge GST from the complainant/allottee as the liability of GST had not become due up to the due date of possession as per the flat buyer's agreement. The Authority is of further view that in case of late delivery by the promoter only the difference between post GST and pre-GST should be borne by the promoter. The promoter is entitled to charge from the allottees the applicable combined rate of VAT and/or service

tax. However, it further directs that the difference between post GST and pre-GST shall be borne by the promoter.

57. Moreover, the fact cannot be ignored that it has already refunded an amount equivalent to Rs. 61,227 charged from the allottees on account of pre-GST, any further amount charged from the allottee part from the aforesaid quoted amount, the same shall also be refunded in view of the above finding of the Authority.

58. **Community Building Furnishing Charges and Interest Free Maintenance Charges** - The respondent stated that such charges has been charged as per clause 4.2 of buyer's agreement dated 26.12.2012, the aforesaid charges are not part of BSP. The relevant clause of the buyer's agreement has been reproduced hereunder: -

> *The BSP of the Apartment is exclusive of EDC and IDC and other statutory deposits and/or charges, including charges for connections and use of electricity, water, sewerage, sanitation and other amenities, utilities and facilities or any other charges required to be paid by the Company to relevant authorities and shall be payable by the Buyer at such rates as may then be applicable and in such proportion as the Sale Area of the Apartment bears to the total sale area of all the apartments in the Project. If in case at any time in the future, such charges/rates are revised due to enhancement in government and statutory dues, or rates of taxes, cesses or charges under Applicable Laws are enhanced (including with retrospective effect, if applicable), or if fresh notifications and/or amendments / modifications thereto are announced by any Government and/or Competent Authority, including but not limited to revision in the EDC/IDC/other*

statutory charges, increase in rates/amounts of any deposits/fees for the provision of electricity, water and sewerage facilities, additional fire. protection/mitigation systems, pollution control and effluent treatment plants, rain water harvesting systems or other outgoings of whatever nature, whether prospectively or retrospectively, and by whatever name called, the same shall also be payable by the Buyer in such proportion as the Sale Area of the Apartment bears to the total sale area of all the apartments in the Project. All such charges shall be payable by the Buyer on first demand of the Company/Maintenance Agency, whether before or after registration of the Conveyance Deed and irrespective of the Payment Plan. Delays in making such payments shall attract interest at rates as applicable for payments under the Payment Plan.

59. It is submitted on behalf of the complainant that the charges raised above by the promoter are not covered under any provision of ABA. Though the complainant is liable to pay basic sale price of the unit besides EDC, IDC & other statutory deposits but never agreed to pay amount under any head as demanded. The respondent is justified in demanding EDC & IDC as it is included in the total sale consideration as per clause 4.1 of the agreement on page no. 73 of the complaint but since these charges are payable on actual payment basis the respondent cannot charge a higher rate against EDC/IDC as actually paid to the concerned authority. Therefore, the respondent is directed to provided calculation of EDC & IDC.

F.V Direct the respondent to restrain them from charging adhoc charges, car parking user charges and refund hvat .

60. In the notice for possession letter dated 08.12.2017 the respondent has charged Rs. 25,31,277 /- wherein the adhoc charges such as havt , Dual Meter connection charges phe charges , ffth charges etc. are also added . This issue has been specifically adjudicated by the authority in complaint bearing no. **CR/4031/2019 titled as Varun Gupta Vs. Emaar MGF Land Limited** wherein the authority has held that for any other charges like incidental / miscellaneous and of like nature , since the same are not defined and no quantum is specified in the builder buyer's agreement , therefore the same cannot be charged.

61. In the instant matter, as per clause 1 (xii) and 3.4 of the builder buyer's agreement26.12.2012, the allottee had agreed to pay the cost of covered car parking charges over and above the basic sale price. Accordingly, the promoter is justified in charging the same.

F.VI Direct the respondent to refund excess amount collected on account of edc and idc.

62. As per clause 4.1 of the buyer's agreement, EDC and IDC were included in total sale consideration. But since these charges are payable on actual payment basis the respondent cannot charge a higher rate against EDC/IDC as actually paid to the concerned authority. Therefore, the respondent is directed to provide detailed calculation of EDC & IDC along with justification before its levy.

G. Directions of the Authority:

63. 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

functions entrusted to the Authority under Section 34(f) of the Act of 2016:

a. The respondent shall pay interest at the prescribed rate i.e., 10.75 % per annum for every month of delay on the amount paid by the complainant from due date of possession i.e., 24.12.2016 till the date of offer of possession (08.12.2017) plus two months i.e., 08.02.2018 as per proviso to section 18(1) of the Act read with rule 15 of the rules.

b. Out of amount so assessed, the respondent is entitled to deduct the amount already paid towards DPC i.e., Rs. 1,98,942/-

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

d. The respondent is directed to pay arrears of interest accrued, if any after adjustment in statement of account; within 90 days from the date of this order as per rule 16(2) of the rules.

e. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period. The respondent is further directed to handover the possession within next two weeks and the complainant is also directed to take the possession of the subject unit.

f. 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.

64. Complaint stands disposed of.

65. File be consigned to the registry.

(Sanjeev Kumar Arora)	(Ashok Sangwan)	(Vijay Kumar Goyal)
Member	Member	Member

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 26.09.2023