

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

Complaint no.	:	473/2022
Date of filing complaint:		09.02.2022
First date of hearing:		22.03.2022
Date of decision	:	20.09.2023

Mr. Jitender Kumar Resident of: Shop no. G-01, Mefcons Plaza, Plot no. 5, Central Market, Sector- 6 Dwarka.	Complainant
Versus	
M/s VSR Infratech Pvt. Ltd. Regd. office: Plot No. 14, Ground Floor, Sector 44, Gurgaon 122003	Respondent

CORAM:

Shri Ashok Sangwan

Member
APPEARANCE:

Shri Gaurav Rawat Advocate

Complainant

Ms. Shriya Takkar Advocate

Respondent

ORDER

- The present complaint has been filed by the complainant/allottee under section 31 of the Real Estate (Regulation and Development) Act, 2016 (in short, the Act) read with rule 28 of the Haryana Real Estate (Regulation and Development) Rules, 2017 (in short, the Rules) for violation of section 11(4)(a) of the Act wherein it is inter alia prescribed that the promoter shall be responsible for all

obligations, responsibilities, and functions under the provisions of the Act or the rules and regulations made there under or to the allottee as per the agreement for sale executed inter se.

A. Unit and project-related details

2. The particulars of the project, the details of sale consideration, the amount paid by the complainant, the date of proposed handing over of the possession, and the delay period, if any, have been detailed in the following tabular form:

Sr. No.	Particulars	Details
1.	Name of the project	"114 Avenue", Sector-114, Gurugram
2.	Project area	2.968 acres
3.	Nature of the project	Commercial Colony
4.	DTCP license no. and validity status	72 of 2011 dated 21.07.2011 valid upto 20.07.2024
5.	Name of licensee	AMD Estate and Developers Pvt Ltd
6.	RERA Registered/ not registered	53 of 2019 dated 30.09.2019
7.	Unit no.	G 90 (Page 38 of the complaint)
8.	Unit area measuring	523 sq. ft. (Page 38 of the complaint)
9.	Date of allotment letter	30.07.2012 (Page 38 of the complaint)

10.	Date of start of construction	19.02.2012 (Page 188 of the reply)
11.	Date of execution of Space buyer agreement	10.10.2012 (Page no. 71 of complaint)
12.	Possession clause	32. Possession Time and Compensation <i>"That the company shall give possession of the said unit within 36 months of signing of this Agreement or within 36 months from the start of construction of the building whichever is later".</i> (Page 36 of the complaint)
13.	Due date of possession	10.10.2015 (Calculated from date of execution of SBA as it is later)
14.	Total sale consideration	Rs. 42,73,972/- (Also Rs.78,469/- as IFMS) (Page 74 of the complaint)
15.	Amount paid by the complainants	Rs. 27,99,009/- (Page 156 of the reply) (construction linked payment plan)
16.	Occupation certificate /Completion certificate	17.02.2021 (Page 151 of the complaint)
17.	Offer of possession (Fit out)	26.02.2021 (Page no.154 of reply)

18.	Reminder letter	26.03.2012,11.04.2012, 05.08.2013,12.08.2013,24.08.2013, 31.05.2017 15.06.2017,10.07.2017, 22.08.2017,12.09.2017, 12.04.2018 (Annexure R-12 of Reply)
19.	Cancellation letter	10.02.2022

B. Facts of the complaint:

3. In 2011, the respondent company issued an advertisement announcing a commercial Colony project "114 Avenue" situated in Sector 114, Village Bajghera, Haryana, and thereby invited applications from prospective buyers for the purchase of units in the said project. The respondent company told about the moonshine reputation of the company and the representative of the respondent company made huge presentations about the project mentioned above and also assured that they have delivered several such projects in the National Capital Region.
4. Relying on various representations and assurances given by the respondent company and on the belief of such assurances, the original allottee namely Mr. Rajesh Kumar Goyal, booked a commercial unit in the project by paying an amount of Rs. 11,26,861.00 dated 13.07.2011.
5. The respondent sent an allotment letter dated 30.07.2012 to the original allottee, confirming the booking of the unit dated 13.07.2011, allotting unit no. G-90, Ground Floor, measuring 523.130 sq. ft (super built-up area) in the aforesaid project of the developer for a total sale consideration of the unit i.e. Rs. 45,05,198.59, which includes basic price, Plus EDC and IDC, and

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other Specifications of the allotted unit and providing the time frame within which the next installment was to be paid.

6. That the original allottees sold the said unit to Mr. Jitender Kumar (Complainant) vide an endorsement dated 03.10.2012 in his favor. The same was acknowledged by the respondent vide nomination letter in favor of the complainant. Thereafter a space buyer's agreement was executed between the complainant and respondent on 10.10.2012.
7. As per clause 32 of the space buyer's agreement, the respondent had to deliver the possession within 36 months from the date of signing of the agreement or the date of start of construction, whichever is later. The date of start of construction is 01.01.2012. Therefore, the due date of possession is calculated from the date of agreement i.e. 10.10.2012. Hence, the due date of possession comes out to be 10.10.2015.
8. As per the demands raised by the respondent, based on the payment plan, the complainant has already paid a total sum of Rs. 27,99,009.00/- towards the said unit against the total sale consideration of Rs. 45,05,198.59.
9. Though the payment to be made by the complainants was to be made based on the construction on the ground unfortunately the demands being raised did not correspond to the factual construction situation on the ground.
10. The complainants approached the respondent and asked about the status of the construction and also raised objections towards the non-completion of the project. During the period the complainants went to the office of the respondent several times and requested

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them to allow him to visit the site but he was never allowed stating that they do not permit any buyer to visit the site during the construction period

11. The complainant after many requests and emails; received the offer of possession on 26.02.2021. Furthermore, several illegal demands on account of the following which are not payable as per the space buyer agreement:
- (i) Advance monthly maintenance for 18 months of Rs. 1,12,996.00
 - (ii) Electric connection charges of Rs. 39,235.00
 - (iii) Air condition charges of Rs. 1,04,626.00.
 - (iv) late payment charges of Rs. 5,76,768.99
 - (v) Administrative charges of Rs. 15,000.00
 - (vi) Contingency of Rs. 1,04,626.00
12. That offering possession by the respondent on payment of charges which the buyer is not contractually bound to pay, cannot be considered to be a valid offer of possession and those charges were never payable by the complainants as per the Agreement.
13. The respondent asked the complainant to sign the indemnity bond as a requisite condition for handing over the possession. The complainant has objected above said the pre-requisite condition of the respondent as no delay possession charges were paid to him but the respondent instead of paying the delay possession charges refused to hand over to possession if the complainant did not sign the aforesaid indemnity bond. Therefore, the complainant was left with no option but to sign the same.

14. That the complainant sent a legal notice dated 24.06.2021, to the respondent mentioning various deficiencies on the part of the respondent, requesting to obtain the OC, and challenging the demand letter/offer of possession for fit out dated 26.02.2021. Further complainant has also sent emails dated 25.04.2018, 05.09.2018, 02.01.2019, 22.03.2019, and 31.05.2019 to the respondent raising various issues concerning the said unit and asking the reason for the delay in completing the construction of the project and timeline within which possession will be handed over to him and challenging the various illegal and one-sided demands letters sent to the complainant, but the respondent till date has failed to provide any satisfactory response to the complainant.

C. Relief sought by the complainant:

15. The complainants have sought the following relief(s):
- i. Direct the respondent to hand over the possession of the said unit with the amenities and specifications as promised.
 - ii. Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest as per RERA from the due date of possession till the date of actual physical possession
 - iii. Direct the respondent to not force the complainant to sign any Indemnity cum undertaking to indemnify the builder from anything legal as a precondition for signing the conveyance deed.
 - iv. Direct the respondent to set aside a demand letter dated 26.02.2021 on account of the offer of possession for fit-outs.

- v. Direct the respondent to not charge anything which is not part of the payment plan as agreed upon.
- vi. Direct the respondent to provide the exact layout plan of the said unit.

D. Reply by the respondent

16. That the complainant is a subsequent allottee. The unit in question was booked by one Mr. Rajesh Kumar Goyal. That the original allottee had willfully agreed to the terms and conditions of the agreement and thereafter the original allottee vide letter dated 20.09.2012 requested the respondent for the transfer of the unit in the name of the complainant herein. That the respondent company as a goodwill gesture acceded to the request of the original allottee and transferred the said unit in the name of the complainant herein. Accordingly, the allotment letter and the payment receipts along with other necessary documents were endorsed in favor of the complainant herein. It is submitted that the complainant herein has stepped into the shoes of the original allottee. The space buyers agreement was executed between the complainant and the respondent on 10.10.2012. The price of the unit in question as per the agreement was Rs. 42,73,972/- plus taxes, levies, and other charges.
17. As per clause 32 of the space buyers agreement dated 10.10.2012, the respondent was supposed to hand over the possession within 36 months of signing that agreement i.e. 10.10.2012 or within 36 months from the date of start of construction of the said building i.e. in the year 2012 whichever is later and thus possession date comes out to be 10.10.2015. However, the said timeline was subject

to force majeure conditions. As per clause 32 of the space buyer's agreement, the respondent shall be entitled to an extension of time for delivery of possession of the said premises if such performance is prevented or delayed due to conditions as mentioned therein. Despite exercising diligence and continuous pursuance of the project to be completed, the project of the respondent could not be completed as prescribed for the following reasons- Incompletion of the Dwarka expressway road project, Supreme court mining regulations, the problem of subsoil water, water supply issues, labor shortage, delayed environmental clearances, directions of Hon'ble NGT, Covid 19 pandemic, etc.

18. That the original allottee had willfully agreed to the terms and conditions of the agreement and the complainant herein has purchased the unit from the original allottee after understanding all the terms and conditions of the agreement. The complainant was neither forced nor influenced by the respondent to sign the said agreement. It was the complainant who after understanding the clauses signed the said agreement in his complete senses.
19. It is submitted that all the demands raised by the respondent are as per the schedule of payment opted by the complainant. Hence, being aware of the payment as per the payment plan, he failed to make timely payments and therefore is a chronic defaulter and is liable to pay interest to the respondent for the delay in payment under Section 19 (6) RERA which states that the complainant is responsible to make necessary payments in the manner and within time as specified in the agreement and in case of default the complainant is liable to pay interest for delay under Section 19(7)

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of RERA. That it is submitted that despite receiving various reminders the complainant failed to clear his outstanding dues and perform his contractual obligations. It is submitted that the amount paid by the complainant to date is Rs. 27,99,009/- and an amount of Rs. 32,53,005.79/- plus interest is still outstanding towards his dues.

20. As per the clause under the MODEL agreement, the allottee is considered to be in default in case the payments are not made as per the agreement. In addition to the penalty liability in case of default, the promoter has also been given an option to cancel the allotment in case of default and in such a case, the allottee is only entitled to the refund of the amount after deducting the booking amount and interest liabilities.
21. That the complainant has not approached the Hon'ble Authority with clean hands. It is submitted that the complainant is attempting to raise nonissues and is now, at a belated stage, attempting to seek a modification of the agreement entered into between the parties to acquire benefits for which the complainant is not entitled in the least.
22. That the complainant herein is himself engaged in the business of real estate. The complainant is not a genuine consumer and an end user since he has booked the unit in question purely for commercial purposes as a speculative investor and to make profits and gains. The complainant has not disclosed its financial position and the statement of income and assets for the last 5 (five) years before the date of booking of the above unit. The complainant must file copies of its income tax returns for the 5 years before the date of booking.

Details of the total assets both moveable and immovable together with the value of each asset in the name of the complainant should also be disclosed, which would indicate whether the aforesaid booking was done, like other properties, for investment purposes.

23. That the complainant has suppressed many material facts, which are extremely relevant for a proper adjudication of the present dispute. For the reason the complainant has malafidely suppressed material facts from this Hon'ble Authority, which is tantamount to playing fraud upon this Hon'ble Authority, the complainant does not deserve any relief and the present complaint merits dismissal on this count itself.

E. Jurisdiction of the authority:

24. The plea of the respondent regarding the rejection of the complaint on the grounds of jurisdiction stands rejected. The authority observes that it has territorial as well as subject matter jurisdiction to adjudicate the present complaint for the reasons given below.

E. I Territorial jurisdiction

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

E. II Subject matter jurisdiction

Section 11(4)(a) of the Act, 2016 provides that the promoter shall be responsible to the allottee as per the agreement for sale. Section 11(4)(a) is reproduced as hereunder:

Section 11(4)(a)

Be responsible for all obligations, responsibilities, and functions under the provisions of this Act or the rules and regulations made thereunder or to the allottees as per the agreement for sale, or to the association of allottees, as the case may be, till the conveyance of all the apartments, plots or buildings, as the case may be, to the allottees, or the common areas to the association of allottees or the competent authority, as the case may be;

Section 34-Functions of the Authority:

34(f) of the Act provides to ensure compliance with the obligations cast upon the promoters, the allottees, and the real estate agents under this Act and the rules and regulations made thereunder.

25. So, given the provisions of the Act quoted above, the authority has complete jurisdiction to decide the complaint regarding non-compliance of obligations by the promoter leaving aside compensation which is to be decided by the adjudicating officer if pursued by the complainant at a later stage.

F. Findings on the objections raised by the respondent:**F.1 Objection regarding the entitlement of DPC on the grounds of the complainant being an investor.**

26. The respondent has taken a stand that the complainant is the investor and not consumer, therefore, he is not entitled to the protection of the Act thereby not entitled to file the complaint under section 31 of the Act. The respondent also submitted that the preamble of the Act states that the Act is enacted to: protect the interest of consumers of the real estate sector. The authority observes that the respondent is correct in stating that the Act is

enacted to protect the interest of consumers of the real estate sector. It is a settled principle of interpretation that a preamble is an introduction of a statute and states the main aims & objects of enacting a statute but at the same time preamble cannot be used to defeat the enacting provisions of the Act. Furthermore, it is pertinent to note that any aggrieved person can file a complaint against the promoter if the promoter contravenes or violates any provisions of the Act or rules or regulations made thereunder. Upon Careful perusal of all the terms and conditions of the space buyer's agreement, it is revealed that the complainant is a buyer and he has paid a total price of Rs. 27,99,009/- to the promoter towards the purchase of an apartment in its project. At this stage, it is important to stress upon the definition of term allottee under the Act, the same is reproduced below for ready reference:

*"2(d) **"allottee"** about a real estate project, means the person to whom a plot, apartment, or building, as the case may be, has been allotted, sold (whether as freehold or leasehold), or otherwise transferred by the promoter, and includes the person who subsequently acquires the said allotment through sale, transfer or otherwise but does not include a person to whom such plot, apartment or building, as the case may be, is given on rent;"*

27. In view of the above-mentioned definition of "allottee" as well as all the terms and conditions of the space buyer's agreement executed between promoter and complainant, it is crystal clear that the complainant is allottee as the subject unit was allotted to him by the promoter. The concept of investor is not defined or referred to in the Act. As per the definition given under section 2 of the Act, there will be "promoter" and "allottee" and there cannot be a party having the status of "investor". The Maharashtra Real Estate Appellate

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Tribunal in its order dated 29.01.2019 in appeal no. 0006000000010557 titled as M/s Srushti Sangam Developers Pvt Ltd. Vs. Sarvapriya Leasing (P) Ltd. Anr. has also held that the concept of investors is not defined or referred to in the Act. Thus, the contention of a promoter that the allottee being an investor is not entitled to protection of this act also stands rejected.

F.II Objection regarding the complainant is a subsequent allottee.

I. Where the subsequent allottee had stepped into the shoes of the original allottee before the due date of handing over possession.

28. In the instant case, the original allottee and complainant/subsequent allottee had intimated the respondent about the endorsement of the said unit in the name of the complainant/subsequent allottee vide endorsement letter dated 03.10.2012. The authority has perused the said endorsement letter, furthermore, the space buyer agreement dated 10.10.2012 has been signed on behalf of the complainant, and thereafter all the demands have been raised upon the complainant, and such demands have been paid under the complainant's name only. The aforesaid facts clearly state that the subsequent allottee/complainant entered into the shoes of the original allottee. As per the space buyer agreement, the due date of delivery of possession was 10.10.2015, but the unit was not ready by that time. The fit-out offer of possession was only offered on 26.02.2021 after a considerable delay. If these facts are taken into consideration, the complainant/subsequent allottee had agreed to buy the unit in question with the expectation that the respondent/promoter

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would abide by the terms of the builder-buyer agreement and would deliver the subject unit by the said due date. At this juncture, the subsequent purchaser cannot be expected to know by any stretch of the imagination that the project will be delayed and the possession will not be handed over within the stipulated period. So, the authority is of the view that in the cases where the subsequent allottee had stepped into the shoes of the original allottee before the due date of handing over of possession, the delayed possession charges shall be granted w.e.f the due date of handing over of possession.

G. Findings on relief sought by the complainant.

G.1 Direct the respondent to hand over the possession of the said unit with the amenities and specifications as promised.

G.4 Direct the respondent to set aside the demand letter dated 26.02.2021 on account of the offer of possession for fit-outs and to not charge anything that is not part of the payment plan as agreed upon.

29. G1 and G2 being connected reliefs are taken up together.

30. In the instant case, the space buyer agreement was executed between the complainant and the respondent on 10.10.2012, and as per clause 32 of the said agreement, the possession was to be handed over within 3 years. The said clause is reproduced below:

"That the company shall give possession of the said unit within 36 months of signing of this Agreement or within 36 months from the start of construction of the building whichever is later".

Therefore the due date of possession comes out to be 10.10.2015.

31. There has been a delay in obtaining the occupation certificate by the respondent, the said OC was obtained only on 17.02.2021.

Thereafter the respondent issued an offer for "fit out" possession on 26.02.2021 as a certain amount was yet to be paid by the complainant. After this, the complainant filed a complaint with this Authority on 09.02.2022, and consequently on 10.02.2022, the respondent canceled the allotment of the said unit of the complainant. However, such a termination letter cannot be termed valid as it is evident that said termination is used as a coercive and retributive tactic.

32. Furthermore, at this stage, the authority would express its views regarding the concept of a "valid offer of possession". It is necessary to clarify this concept because, after a valid and lawful offer of possession, the liability of the promoter for the delayed offer of possession comes to an end. On the other hand, if the possession is not valid and lawful, the liability of the promoter continues till a valid offer is made and the allottee remains entitled to receive interest for the delay caused in handing over of possession. The Authority after a detailed consideration of the matter has concluded that a valid offer of possession must have the following components:

- i. **The possession must be offered after obtaining an occupation certificate.**
- ii. **The Subject unit must be in a habitable condition.**
- iii. **Possession should not be accompanied by unreasonable additional demands**

33. As the occupation certificate has been obtained by the respondent, the offer of possession can be made by the respondent. As per section 19(10) of the Act, the complainant/allottee is duty-bound

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to take possession within two months of the occupancy certificate issued for the said unit.

34. On the issue of additional demands, the said issue has been dealt with in detail in succeeding paras.
35. The complainant contended that the letter for the offer of "fit out" possession is bad in law as it has raised several illegal demands that are not listed in the space buyer agreement. The demands raised illegally as per the complainant are as follows: Electric connection charges (ECC), power backup charges (PBC), Air conditioning charges (ACC), Late payment charges (LPC), Administrative charges (AC), Advance maintenance charges (AMC) for 18 months, and contingency charges (CC).
36. However clause 2 and 7 of the space buyer agreement mentions the following charges; Air conditioning charges (ACC), power backup charges (PBC), and electric connection charges (ECC) as not part of the sale price and have to be borne by the allottee. The said clauses are reproduced below:

"2. The sale price does not include the following:

- (e) Electric connection charges and meter charges. The amount payable on this account will depend on the estimates approved by DHBVN for service connection/substation equipment, cost of area security deposit, etc.*
- (f) Power backup charges*
- (g) Air conditioning cost)"*

"7. (a) The Company shall distribute electricity through sub-meters installed for each Said Unit. Costs of installation of sub-meter and consumption charges as billed by the

Company/Maintenance Agency nominated by the company shall be paid by the Allottee.

(b) The rate mentioned in this agreement is inclusive of the cost of providing electric wiring in each Unit and fire fighting equipment in the common areas but does not include the cost of electric fittings, fixtures, electric meter, etc. which shall be installed by the Allottee at his/her/its own cost.

(c) The rate mentioned in this agreement is for bare shell condition of the office/retail space(s) areas. The common areas shall also be delivered in finished condition by the company at no extra cost. However, power backup and air conditioning charges shall be required to be paid extra. The specification is as per Annexure VI.

(d) The design of said commercial colony is non-air conditioned. However, if the company decides to partly or fully air-condition the area of the allottee/entire building, the allottee agrees to pay his/her its proportionate share of the air-conditioning cost as determined by the company.

37. Given the agreed terms of the buyer's agreement, the aforesaid demand of ECC, ACC, and PBC raised in the letter of offer of "fit out" possession cannot be termed as illegal.

38. On the issue of advance maintenance charges, as per the BBA, it has been conveyed transparently and fairly by the respondent to the prospective allottees/purchasers that the prospective allottees/purchasers would be under a contractual obligation to bear and pay the maintenance charges. It had been unambiguously and explicitly recited in the contracts executed by the prospective allottees/purchasers that the prospective allottee/purchaser would be liable to pay the maintenance charges as may be determined by the respondent/the maintenance agency etc. so nominated/appointed to provide for the maintenance services.

Such provisions for the maintenance charges have been explicitly agreed to by the prospective allottee/purchaser.

39. In the instant case, the respondent in its letter of offer of "fit out" possession dated 26.02.2021 has raised a demand for advance maintenance charges of Rs. 1,12,996/- for 18 months.
40. The law relating to the demand of advance maintenance charges has been laid down in the CR/4031/2019 and others. 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 a year. Therefore the said demand raised is illegal.
41. On the issue of late payment charges, the respondent has raised a demand of Rs. 5,76,768/- upon the complainant in the letter of offer of "fit out" possession dated 26.02.2021. However, clause 19 of the said agreement states that an interest of 18% p.a. shall be charged on delayed payments. The said clause is reproduced below:

"19. Without prejudice to the Company's aforesaid rights, the Company may at its sole discretion waive the breach by the Allottee in not making payments as per the Payment Plan but on the condition that the Allottee shall pay to the Company, interest which shall be charged from the due date @ 18% per annum. In the event, that the company decides to waive its right to cancel the allotment and to forfeit the earnest money and instead accept the outstanding payment with interest in lieu thereof, no right whatsoever would accrue to any other defaulting Allottee and/or Allottee in future to entitle them or any of them to insist that the company is bound to accept the 1 outstanding amount with accumulated interest. Each case shall be examined separately/individually by the

company and shall be dealt with in a manner deemed appropriate and suitable by the company at its absolute discretion."

42. In the instant case, the space buyer agreement was executed between the complainant and the respondent on 10.10.2012, and as per clause 32, the possession was to be handed over within 3 years, therefore the due date of possession comes out at 10.10.2015. There has been a considerable delay on the part of the respondent in fulfilling his obligations under the agreement. Given the above, it is the view of the Authority that when the respondent himself has delayed the project and has violated the said agreement, he is estopped from recouping to terms of the same agreement he violated. Furthermore, the provision of clause 19 is highly biased towards the respondent and aims at extorting a punitive interest rate of interest at 18% p.a. which clearly cannot be allowed. Therefore the demand raised at such a high interest rate is wrong and illegal.
43. On the issue of administrative charges and contingency charges as mentioned in the letter of offer of "fit out" possession; on careful perusal of the space buyer agreement dated 10.10.2012 signed between the parties to complaint, the Authority could not find any explanation, cause, or definition of the aforesaid charges. Nowhere in the said BBA has it been mentioned what entails the administrative charges and what is the purpose of the contingency charges. However, the respondent has charged both advance monthly charges and interest-free maintenance security. Furthermore, no explanation for the same has been provided by the

respondent either in written pleadings or oral pleadings. Given this, the aforesaid demand is illegal.

44. Given the aforesaid discussion, it can be stated that the letter dated 26.02.2021 had several illegal demands therefore the said offer cannot be termed as valid offer of possession.

G.2 Direct the respondent to pay the interest on the total amount paid by the complainant at the prescribed rate of interest as per RERA from the due date of possession till the date of actual physical possession

45. In the instant case, the complainant wishes to continue with the project and is seeking DPC as provided under the proviso to sec 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."

46. The space buyer agreement was executed between the complainant and the respondent on 10.10.2012, and as per clause 32, the possession was to be handed over within 3 years. The said clause is reproduced below:

"That the company shall give possession of the said unit within 36 months of signing of this Agreement or within 36 months from the start of construction of the building whichever is later".

47. **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]

(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's 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.

48. 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.
49. Consequently, as per the website of the State Bank of India i.e., <https://sbi.co.in>, the marginal cost of lending rate (in short, MCLR) as of the date i.e., 20.09.2023 is **8.75%**. Accordingly, the prescribed rate of interest will be the marginal cost of lending rate +2% i.e., **10.75%**.
50. The definition of the 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:

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"(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 that 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;"*

51. 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 it in case of delayed possession charges.
52. On consideration of the circumstances, the documents, submissions made by the parties, and based on the findings of the authority regarding contravention as per provisions of rule 28(2), the Authority is satisfied that the respondent is in contravention of the provisions of the Act. By virtue of clause 32 of the agreement executed between the parties on 10.10.2012, the possession of the subject unit was to be delivered within 36 months from the date of execution of the buyer's agreement or the start of construction of the building whichever is later. Therefore, the due date for handing over possession was 10.10.2015 (from the date of execution of SBA). The respondent has failed to hand over possession of the subject unit till the date of this order. Accordingly, it is the failure of the respondent/promoter to fulfill its obligations and responsibilities as per the agreement to hand over the possession

within the stipulated period. The authority is of the considered view that there is a delay on the part of the respondent to offer possession of the allotted unit to the complainants as per the terms and conditions of the buyer's agreement dated 10.10.2012 executed between the parties.

53. Accordingly, it is the failure of the promoter to fulfill its obligations and responsibilities as per the agreement dated 10.10.2012 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 allottees shall be paid, by the promoter, interest for every month of a delay from the due date of possession i.e., 10.10.2015 till the date of the offer of possession plus 2 months or actual handing over of possession, whichever is earlier; at 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.

G.3 Direct the respondent to not force the complainant to sign any Indemnity cum undertaking to indemnify the builder from anything legal as a precondition for signing the conveyance deed.

54. The law regarding the signing of indemnity cum undertaking is well settled. An undertaking/ indemnity bond given by a person thereby giving up their valuable rights must be shown to have been executed in a free atmosphere and should not give rise to any suspicion. If the slightest doubt arises in the mind of the adjudicator that such an agreement was not executed in an atmosphere free of

doubts and suspicions, the same would be deemed to be against public policy and would also amount to unfair trade practices. No reliance can be placed on any such indemnity-cum-undertaking and the same is liable to be discarded and ignored in its totality. Furthermore, the NCDRC order dated 03.01.2020 in a case titled Capital Greens Flat Buyer Association and Ors. Vs. DLF Universal Ltd., Consumer case no. 351 of 2015, wherein it was held that the execution of indemnity cum-undertaking would defeat the provisions of sections 23 and 28 of the Indian Contract Act, 1872, and therefore, would be against public policy, besides being an unfair trade practice. The relevant portion of the said judgment is reproduced herein below:

"Indemnity-cum-undertaking
30. The developer, while offering possession of the allotted flats insisted upon execution of the indemnity-cum-undertaking before it would give possession of the allotted flats to the concerned allottee. Clause 13 of the said indemnity-cum-undertaking required the allottee to confirm and acknowledge that by accepting the offer of possession, he would have no further demands/claims against the company of any nature, whatsoever. It is an admitted position that the execution of the undertaking in the format prescribed by the developer was a prerequisite condition, for the delivery of the possession. The opposite party, in my opinion, could not have insisted upon clause 13 of the Indemnity-cum-undertaking. The obvious purpose behind such an undertaking was to deter the allottee from making any claim against the developer, including the claim on account of the delay in delivery of possession and the claim on account of any latent defect that the allottee may find in the apartment. The execution of such an undertaking would defeat the provisions of Sections 23 and 28 of the Indian Contract Act, 1872, and therefore would be against public policy, besides being an unfair trade practice. Any delay solely on account of the allottee not executing such an undertaking would be attributable to the developer and would entitle the

allottee to compensation for the period the possession is delayed solely on account of his having not executed the said undertaking-cum-indemnity." The said judgment of NCDRC was also upheld by the Hon'ble Supreme Court vide its judgment dated 14.12.2020 passed in civil appeal nos. 3864-3889 of 2020 against the order of NCDRC."

Therefore, this authority does not place reliance on such indemnity cum undertaking, and the complainant cannot be made to sign such undertakings.

G.6 Direct the respondent to provide the exact layout plan of the said unit.

55. As per section 11(3)(a) of the Real Estate (Regulations and Development) Act, 2016 the promoter must make available the sanctioned plans and lay out a plan of the allotted unit to the allottee.

The said clause is reproduced below:

Sec- 11 (3) The promoter at the time of the booking and issue of the allotment letter shall be responsible for making available to the allottee, the following information, namely:—

(a) sanctioned plans, layout plans, along with specifications, approved by the competent authority, by display at the site or such other place as may be specified by the regulations made by the Authority;

56. From the aforesaid clauses, it is evident that the promoter/respondent is under an obligation to provide a layout plan to the allottee. Hence, the same shall be provided by the respondent within 30 days.

H. Directions issued by the Authority:

57. Hence, the Authority hereby passes this order and issues the following directions under section 37 of the Act to ensure compliance with obligations cast upon the promoter as per the



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

- i. The respondent is directed to make a valid offer of possession along with an updated statement of accounts after adjusting DPC.
- ii. The respondent is directed to pay interest to the complainant against the paid-up amount at the prescribed rate of 10.75% p.a. for every month of delay from the due date of possession i.e., 10.10.2015 till actual handing over of possession or offer of possession plus two months, whichever is earlier, as per section 18(1) of the Act of 2016 read with rule 15 of the rules.
- iii. The complainant is directed to pay outstanding dues, if any, after adjustment of interest for the delayed period;
- iv. The arrears of such interest accrued from 10.10.2015 till the date of order by the authority shall be paid by the promoter to the allottees within a period of 90 days from the date of this order and interest for every month of delay shall be paid by the promoter to the allottee before 10th of the subsequent month as per rule 16(2) of the rules;
- v. The rate of interest chargeable from the allottee by the promoter, in case of default, shall be charged at the prescribed rate i.e., 10.75% by the respondent/promoter which is the same rate of interest which the promoter shall be liable to pay the allottee, in case of default i.e., the delayed possession charges as per section 2(za) of the Act.
- vi. The respondent shall not charge anything from the complainant which is not part of the buyer's agreement.

58. Complaint stands disposed of.



59. File be consigned to the Registry.


Ashok Sangwan
(Member)

Haryana Real Estate Regulatory Authority, Gurugram

Dated: 20.09.2023



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